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THE ILLINOIS "TWO-TIER" JUDICIAL DISCIPLINARY SYSTEM: FIVE YEARS AND COUNTING

FRANK GREENBERG*

The two-tiered judicial disciplinary system in Illinois, created by the 1970 Constitution, was, at the time it was adopted, and largely remains, a unique departure from the more familiar model, of which California may be said to be the prototype, in which both the investigative and prosecutorial function and the adjudicative function are combined within one agency usually called a "Judicial Qualifications Commission." The commission in California and its counterparts in a great majority of the other jurisdictions are typically a part of the state judicial system. The disciplinary sanctions recommended by these commissions are subject to review by the state supreme court.

Illinois, by contrast, has divorced the disciplinary system from the judicial system, has separated the investigative and prosecutorial function from the adjudicative function and allocated these powers between two independent constitutionally created agencies—a Judicial Inquiry Board and a Courts Commission.¹ The disciplinary system has been so structured as to insulate both the Board and the Courts Commission from any significant degree of control by the judicial, executive and legislative branches of the government.

BACKGROUND

It seems necessary at the outset of this article to understand something of the forces—perhaps peculiarly a part of the Illinois experience in dealing with judicial misconduct and disability—which impelled this departure from the more usual "Judicial Qualifications Commission" model and shaped the "two-tier" or "bifurcated" disciplinary system.

I can make no more than brief reference, here, to the events preceding the Sixth Illinois Constitutional Convention which drafted the 1970 Constitution.²

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1. ILL. CONST. of 1970, art. VI, § 15. See Appendix A.

2. The ground is well covered by R. COHN, *TO JUDGE WITH JUSTICE* (1973) [hereinafter

Until 1964, the history of judicial discipline in Illinois was a barren one. Although the remedies of impeachment and legislative concurrent resolution were theoretically available for the removal of a judge, history records no instance in which an Illinois judge was removed from office by either of these methods or by the older form of legislative address, which is a formal request by the legislature to the Governor that a judge be removed. In 1832 the Illinois House of Representatives voted articles of impeachment against Justice Theophilus W. Smith of the Illinois Supreme Court, charging him with "high misdemeanors." His trial before the Illinois Senate resulted in acquittal and a subsequent effort to remove him by address failed. In 1843 the Illinois House of Representatives voted articles of impeachment against Justice Browne of the Illinois Supreme Court and he, too, was acquitted by the Senate. The proceedings against Justice Browne were apparently the last attempt to remove an Illinois judge by impeachment.³

A constitutional amendment (the 1962 Judicial Article), adopted in 1962 with effect on January 1, 1964,⁴ created a commission composed exclusively of five judges appointed by the supreme court and the appellate court, authorized to hear and determine complaints against judges.⁵ The commission was empowered to retire judges for disability and to impose the sanctions of removal or suspension without pay "for cause." Unfortunately, the constitutional provisions as implemented by the supreme court left a great deal to be desired.⁶ The commission was not permanently convened; it could be called into action only by the chief justice on order of the supreme court or at the request of the Illinois Senate. Despite a belated effort in June 1969⁷ to restructure the commission into a permanently convened body with an investigative staff and an orderly procedure for the initiation and prosecution of charges, it never had much chance to succeed.

cited as COHN]; Cohn, *The Illinois Judicial Department—Changes Effected by the Constitution of 1970*, 1971 ILL. L.F. 355 [hereinafter cited as *The Illinois Judicial Department*]; and W. BRAITHWAITE, *WHO JUDGES THE JUDGES?* (1970) [hereinafter cited as BRAITHWAITE]. These publications are "required reading" in order to understand the background of the present Illinois judicial disciplinary system.

See also G. FIEDLER, *THE ILLINOIS LAW COURTS IN THREE CENTURIES 1673-1973* (1973) [hereinafter cited as FIEDLER] (This book is a remarkably complete documentary history of the Illinois courts. It contains the text of many documents in the area of judicial discipline which are otherwise unpublished and difficult of access).

3. See BRAITHWAITE, *supra* note 2, at 96-97, and FIEDLER, *supra* note 2, at 314.

4. ILL. CONST. of 1870, art. VI (amended 1962) [hereinafter the 1962 Judicial Article].

5. *Id.* §18.

6. For an insight into the shortcomings of the Illinois Courts Commission under the 1962 Judicial Article and a brief history of judicial discipline in Illinois prior to 1970, see BRAITHWAITE, *supra* note 2.

7. See ILL. REV. STAT. ch. 110A, § 51 (1969) (Sup. Ct. R. 51). This rule was rescinded effective July 1, 1971, and replaced by sections 15(e) through (g) of Article VI of the new constitution. See ILL. CONST. of 1970, art. VI §§ 15(e)-(g). These sections provided a new and expanded constitutional basis for the Illinois Courts Commission.

In the summer of 1969, prior to the adoption of the revised rule,⁸ the supreme court, confronted with serious charges of misconduct against the then chief justice and an associate justice of the court,⁹ found it necessary to bypass the existing Courts Commission. The court, publicly acknowledging that an investigation of the charges by a commission controlled by the court would inevitably encounter public skepticism and distrust,¹⁰ appointed an ad hoc special commission of five lawyers to conduct an investigation into the charges.¹¹ The commission's report led to the resignation of the two justices.

It would probably have made no difference even if the June 1969 rule change had been adopted before the supreme court was faced with widely publicized charges against two of its own justices. The effort at shoring up the inadequacies of the Courts Commission created by the 1962 Judicial Article was, in any event, too little and too late.¹²

These events occurred fortuitously just months before the constitutional convention convened in December 1969. It was quickly evident that the system of exclusive judicial control of judicial discipline had lost the confidence of the organized bar, the people, and a substantial majority of the delegates to the convention.¹³

The bar's pervasive dissatisfaction with the way in which the disciplinary system under the 1962 Judicial Article had functioned, or, more accurately, had failed to function, was evident in the joint proposal submitted to the constitutional convention by the Chicago Bar Association and the

8. ILL. REV. STAT. ch. 110A, § 51 (1969) (Sup. Ct. R. 51).

9. See FIEDLER, *supra* note 2, at 314.

10. See Report of the Special Commission of the Supreme Court of Illinois in the Matter of the Special Commission in Relation to No. 39797, Appendix E (June 18, 1969) (unpublished); see also FIEDLER, *supra* note 2, at 317.

11. The author of this article served as chairman of the 1969 special commission.

12. Rubin G. Cohn describes the situation in these terms:

For some time prior to the unfortunate events in the summer of 1969, the constitutional provisions and implementing supreme court rule had been recognized as structurally and procedurally inadequate. The courts commission was an ad hoc body convened to hear a particular charge; it had no continuity of existence or authority. Procedurally, the constitution gave no administrative, investigative, or enforcement staff to the commission, and the initial supreme court rule sketchily outlined the essentials of a proceeding against a judge.

The Illinois Judicial Department, *supra* note 2, at 379.

13. One of the stark facts of overriding importance underscored by the events of June-September 1969 was that the Illinois Courts Commission, a creature of the 1962 judicial amendment and the subject of intensive study and implementation by supreme court rule during the period antecedent and concurrent with the drama, was completely denied any investigative and disciplinary role. Indeed, supreme court judgment determined that the commission was an inappropriate body to investigate the allegations of judicial misconduct. However one viewed the supreme court decision to bypass the courts commission and establish a special commission, to both public and professional minds, the courts commission as structured became suspect as an effective mechanism of judicial discipline.

The Illinois Judicial Department, *supra* note 2, at 381.

Illinois State Bar Association.¹⁴ The joint bar proposal suggested the creation of an independent disciplinary commission consisting of four lawyers and three non-lawyers with power to investigate charges, conduct hearings, and impose sanctions of censure, suspension with or without pay, or removal from office. The commission's decision, while appealable to the supreme court, was not to be reversed, modified or remanded absent a finding by the court that it was "clearly erroneous." It would thus have excluded participation by judges in the decision-making process of the commission and severely limited appellate review. As Rubin G. Cohn observes, "[t]he bar associations' proposal reflected almost with a vengeance the rapidly developing conviction that judges could not be trusted to judge their own colleagues in matters of discipline."¹⁵

It may be, as Cohn suggests, that the joint bar proposal was as much an overreaction to the widely publicized "crisis of confidence" in the judiciary as the implacable opposition by the judiciary to any change that would invade its exclusive control of the disciplinary process.¹⁶ It is, at any rate, a fair measure of the intense controversy which quickly engaged the constitutional convention over "who should judge the judges."

However disparate the views of the bar and the judiciary were, the need was clear. It is described in the Majority Report of the Committee on the Judiciary of the Convention as follows:

The problem of discipline and removal of judges, it is fair to say, has literally exploded upon the public consciousness in Illinois and elsewhere Perhaps at no time in the history of this State has this issue been a matter of such great public discus-

14. Illinois Constitutional Convention, Member Proposal No. 424. Rubin G. Cohn is inclined to be critical of what he sees as a lack of preparation by the bar for the constitutional convention and belated "feverish haste and urgency." His perception of the situation is, at this point, inaccurate. There had been a great deal of quiet discussion and preparation for the submission of a revised judicial article before the summer of 1969. But it was only in the aftermath of the "affair of the two justices of the supreme court" that the leadership of the bar associations became convinced that there was, for the first time, a good chance for the "bill of divorcement" of judicial discipline from exclusive control by the judiciary. The task of obtaining a resounding and virtually unanimous endorsement of the proposal by both bar associations, without which it would have stood no chance in the constitutional convention, was not a simple one. It was only when the groundwork had been carefully laid that the proposal was submitted to an extraordinary meeting of the Board of Managers of the Chicago Bar Association and the Board of Governors of the Illinois State Bar Association—perhaps the first and last time the two bodies met in joint session. The proposal was approved and was subsequently embodied in Member Proposal 424 in the Convention. See COHN, *supra* note 2, at 27-30.

15. THE ILLINOIS JUDICIAL DEPARTMENT, *supra* note 2, at 384.

16. Justice Walter V. Schaefer of the Illinois Supreme Court undoubtedly reflected the views of the Judiciary in this statement submitted to the Judiciary Committee of the Constitutional Convention:

The only rational justification for elaborate provisions concerning the policing of the judicial system is that judges are venal beyond other men, and for that reason they cannot be trusted to determine when disciplinary action should be taken I hate

sion and concern. Public confidence in the honesty and integrity of the judicial system is a factor absolutely central to a free society [T]here has been a serious erosion of public confidence in our courts The restoration of that confidence is a categorical imperative.¹⁷

THE TWO-TIER SYSTEM

In meeting this challenge the constitutional convention fashioned a compromise between the bar proposals and the judiciary's desire for retention of the status quo.¹⁸ The 1970 Constitution¹⁹ deliberately bypassed both the supreme court and the legislature, and created two independent agencies—a Judicial Inquiry Board²⁰ which is entrusted with the investigative and prosecutorial function, and a Courts Commission which is entrusted with the adjudicative function. Both the Board and the Courts Commission find their mandates within the constitution itself.²¹ No provision is made for implementation by the supreme court or the legislature and none is required beyond compliance by the General Assembly with the obligation to "appropriate funds for the operation of the Board"²² and to "provide by law for the expenses of the Commission."²³

As amply demonstrated by the proceedings of the convention, this severance of the Board and the Courts Commission from the executive, judicial and legislative branches of the government (except for appointment of members of the Board by the Governor and the supreme court, and selection of the members of the Courts Commission) was not in any sense accidental.

The Judicial Inquiry Board

The Judicial Inquiry Board consists of nine members—three lawyers, four non-lawyers and two judges. The lawyer and non-lawyer members are appointed by the Governor for four-year terms and may not serve more than eight years. No more than two of the lawyers and two of the non-lawyers

to think of the future consequences that may result from a constitutional provision that can only be explained to successive generations of high school students on the ground that our judicial system is not to be trusted.

VI PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 917-18 (1970).

17. *Id.* at 860.

18. This is not to suggest that the joint bar proposal was the only one submitted to the Judiciary Committee of the Constitutional Convention. There were a round dozen of other member proposals ranging as Cohn reports, "over a wide spectrum of choice and detail" but the bar proposal was the "most provocative and seriously debated." COHN, *supra* note 2, at 68.

19. For convenience, § 15 of article VI of the Illinois Constitution of 1970 is reproduced in Appendix A.

20. Hereinafter referred to in the text and the footnotes as the Board.

21. ILL. CONST. of 1970, art. VI, §§ 15(b), (e).

22. *Id.* § 15(d).

23. *Id.* § 15(g).

may be members of the same political party. The two judges are selected by the supreme court from among the circuit judges of the state. The Board is convened permanently with authority "to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission."²⁴ The filing of a complaint requires concurrence of five members.

The Board has no power or authority to determine a judge's guilt or innocence of any charge or complaint made against him. It has, in fact, no constitutional authority to decide *anything* except the question of whether a "reasonable basis" exists to charge the judge, by the filing of a complaint with the Courts Commission, with:

- willful misconduct in office;
- persistent failure to perform his duties;
- conduct that is prejudicial to the administration of justice;
- conduct that brings the judicial office into disrepute;
- physical or mental inability to perform his duties.²⁵

The authority to decide guilt or innocence and to impose any sanction or discipline is carefully reserved to the Courts Commission. When the Board files a complaint with the commission the charges are tried *de novo* before the commission in an adversary public hearing in which the Board has the role of prosecutor and the respondent is afforded the full panoply of adjudicative due process. The Board has authority to adopt rules governing its procedures and has subpoena power and authority to appoint and direct its staff.²⁶ As already noted, the General Assembly is required to appropriate funds for the Board's operation.²⁷

The Board's investigations are initiated on the basis of complaints or other communications, oral or written, from members of the public, items which appear in the news media, or other information which comes to the attention of the Board. A person who "complains" to the Board about a judge does not thereby acquire standing as the "complainant" in the case. The ultimate *complainant* is the Board itself. If the Board is moved, after preliminary screening, to initiate an investigation, it is the Board's investigation and the complaint that may result from the investigation is the Board's complaint.

The information which may initiate an investigation need not be under oath or even in the form of a written communication. The Board seeks to make itself readily accessible to the public and each communication received by the Board, whatever its source, is examined by each member of

24. *Id.* § 15(c).

25. *Id.*

26. *Id.* § 15(g).

27. *See* note 22 *supra*.

the Board. It is, of course, true that a great majority of such communications do not survive preliminary screening and do not justify a formal investigation. But when there is reason for investigation, it is the Board that initiates the process and ultimately determines whether there is "reasonable basis" for the filing of a complaint with the Courts Commission.

The Board's staff consists of an Executive Director, two full-time investigators, a full-time administrative assistant-secretary at its office in Chicago and a part-time secretary at its office in Springfield.

The Board issues, quarterly, a statistical summary of the disposition of matters which come before it—which is probably as close as it may come, without breaching the confidentiality of its proceedings, to describing the results of its proceedings.²⁸ Except, of course, as the complaints it files with the Courts Commission and the commission's decisions, both of which are public, reflect those cases in which the Board has taken affirmative action.²⁹

The Courts Commission

The Courts Commission, in contrast to the Board, consists entirely of judges—one supreme court justice who is selected by that court and who serves as the commission's chairman, two appellate court judges who are appointed by that court, and two circuit judges who are selected by the supreme court. Although three of the five judges of the commission are appointed by the supreme court, the commission, no less than the Board, has been freed of control or direction by the court. It is entitled to its own appropriation from the General Assembly and may adopt its own rules of procedure.

The Courts Commission is permanently convened to hear complaints filed by the Board. A complaint must be proved by "clear and convincing evidence" (the standard adopted by the commission in its rules) and the commission has authority to impose a broad spectrum of sanctions consisting of reprimand, censure, suspension with or without pay, and removal from office. The concurrence of three members of the commission is

28. A summary (Table I) of the disposition of matters by the Board and a summary (Table II) of dispositions by the Courts Commission of complaints filed by the Board for the period 1971-1976 appears in Appendix B. The tables are an adaptation of the Board's regular quarterly statistical summaries.

29. It would be instructive to make a critical analysis and an effort at a synthesis of the cases which have thus far been decided by the Courts Commission, but that awaits another occasion and perhaps another author. Unfortunately, the decisions of the commission (the commission calls them "orders") are not readily available in published form, although copies may be obtained from the secretary of the commission. For reasons which are unclear, the commission has declined suggestions that it arrange for publication of its decisions or orders as a supplement to the regular Illinois Supreme Court or appellate court reports or in some other form that would make them more accessible to the bench, the bar and the public, as well as to the judicial disciplinary agencies in other jurisdictions.

necessary for a decision. There is no appeal from the decision of the commission. The commission has recognized the fact that both the Board and the commission are "outside the ordinary judicial system and the decision of the . . . Commission is final."³⁰

THE ENDS WHICH OUGHT TO BE SERVED BY THE JUDICIAL DISCIPLINARY SYSTEM

Any effort at an evaluation of what I deem to be the principal advantages of the Illinois system as compared to the more usual commission form necessarily involves an appreciation of the ends which ought to be served by the judicial disciplinary system. Obviously no governmental system is good or bad except as it conduces to the accomplishment of the needs which call it into existence.

On this point, however, I am not sure that there is any real consensus or that my own perception of the ends that ought to be served by the system is any more than a deeply felt personal conviction. There is, of course, also the caveat which must be offered that not all states have had quite the same problems as Illinois on the road toward a viable system of judicial discipline. What may be required in Illinois may not be necessary in states with a less turbulent history of judicial reform or where there is a more sensible method of selecting judges.³¹ But it is required, if my evaluation of the Illinois system is to be understood in proper context, that I submit my own view of what the judicial disciplinary system is about.

I perceive the ends to be five: (1) to gain and maintain public respect for the judiciary; (2) to bring about an increased awareness among the bench and bar of the consequences of violation of the norms of judicial conduct; (3) to teach judges what is expected of them through case-by-case decisions; (4) to deter misconduct; and (5) to remove from office judges who have been unfaithful to their trust or who have become physically or mentally unable to perform their duties.

Respect for and obedience to law cannot be expected unless the exercise of judicial power is accepted as legitimate. I hold, therefore, that the *raison d'être* of the judicial disciplinary system is the imperative that the people shall have confidence in their judiciary. The way to gain and maintain that confidence is to demonstrate to the people that when judicial misconduct or disability does occur, there is a viable institution—the judi-

30. *In re Harrod*, No. 76-CC-3 (Ill. Cts. Comm'n December 3, 1976) at 3.

31. A half century of repeated effort by the organized bar in Illinois has not, as yet, succeeded in obtaining merit selection at any level of the judiciary. The state clings to that now quaint relic of Jacksonian democracy, partisan political election of its judges. Illinois is also Chicago and Chicago is the place where one of its most influential aldermen gave us the deathless dictum that "Chicago ain't ready for reform." The strong Democratic machine which

cial disciplinary system—that can cope with it, with courage and independence and scrupulous impartiality.

Unfortunately, that public confidence is not attainable when the disciplinary system is wholly within the control of the judiciary itself. Whether justified or not, such a system attracts doubt and public skepticism which is mitigated only to the extent that there is a participation in the system by non-judges as well as judges. Nor is public confidence attainable unless the system operates with as much visibility as can be accommodated to the equally obvious need for confidentiality at the investigative stage of the process. As an old aphorism has it, "justice must be done but it must also be *seen* to be done." Those who think that confidence can be gained by cloaking judicial misconduct behind a Potemkin facade are sadly mistaken.

The disciplinary system can help to bring about a heightened awareness on the part of the bench and bar of the consequences of violation of the norms of judicial conduct, with a profound psychological impact on the community of judges, the community of lawyers, and the larger community of consumers of justice. The point is well expressed by Irving R. Kaufman, Chief Judge of the United States Court of Appeals for the Second Circuit, in a plea for the vigorous exposure of lawyers' misconduct.³² While his remarks were addressed to lawyer discipline, they are equally applicable to judicial discipline. Judge Kaufman quotes the sociologist and philosopher, Emile Durkheim, who, as he explains, "first theorized that exposing illegal or unethical conduct heightens the common conscience."³³ Deviance, when revealed, contributes to the revival and maintenance of common sentiments by arousing the community to the consequences of violating fundamental norms. The exposure of misconduct, Durkheim has emphasized, "brings together upright consciences and concentrates them."³⁴

If that seems a bit esoteric, I think the Maryland Supreme Court had much the same idea in mind when it said, in disbaring Spiro Agnew, that "[d]isciplinary proceedings have been established . . . not for punishment but rather as a catharsis for the profession and a prophylactic for the public."³⁵

The work of the judicial disciplinary agencies can also have a *teaching value* of inestimable importance. In the area of judicial ethics, as in other

has dominated Chicago for many years is vitally concerned with the selection of judges as a patronage tool. It is not surprising that the same forces which see merit selection as an intolerable threat to the partisan political apparatus, display about the same degree of enthusiasm for an independent judicial disciplinary system.

32. Kaufman, *Attacking Anomie in the Legal Profession*, 1 LITIGATION 5 (1975).

33. *Id.* at 6.

34. *Id.*

35. Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 549, 318 A.2d 811, 814 (1974).

areas of our law, precedents and doctrines are largely shaped on a case-by-case basis. Nobody can write an all-inclusive manual which tells judges, in every conceivable instance, what is expected of them. The constitutional standards of willful misconduct in office, conduct that is prejudicial to the administration of justice, and conduct that brings the judicial office into disrepute, while not vulnerable to the challenge of vagueness or overbreadth,³⁶ are neither fully self-explanatory nor always adequate guides to the demarcation between the permissible and the impermissible. It is therefore necessary that these broad statements not only be illuminated and informed by the American Bar Association Code of Judicial Conduct or other codes adopted in various states, but be explicated in decisions of the disciplinary agencies and the state supreme courts. Such decisions can serve to evolve a body of doctrine which will sharpen the application of the constitutional standards to specific ethical problems.

The necessity for a "common law" of judicial conduct is all the greater because the state supreme courts have evidenced some reluctance to formulate specific codes of conduct. Although one can appreciate and sympathize with a reluctance to attempt to meet an endless catalog of specific fact situations by rules, the absence of clear-cut answers to a large number of recurring problems lends emphasis to the teaching value of case-by-case decisions.

The judicial disciplinary system also has obvious deterrent value. Its very existence is a deterrent to misconduct and an incentive to judges suffering from physical or mental disability to retire as gracefully as possible. But I rank deterrence relatively low in the values I ascribe to the disciplinary system. If the only way to enforce compliance with norms of judicial conduct is in terrorem, the battle is already lost. It is not by the threat of disciplinary sanctions alone that judges can be won to virtue, but rather by seeking their heightened awareness of what is expected of them. This is not accomplished by brandishing the sword, but rather through candid disclosure of fault where it exists, and the firm imposition of public discipline whenever it is deserved.

All of these values or goals have one thing in common. None of them can be accomplished unless the disciplinary process has an appropriate degree of visibility; they cannot be achieved if corrective or disciplinary measures are hidden from view. While an informal remonstrance or reprimand may correct a fault in a single judge, it does nothing to enlighten his brethren about what is required of them. Nor does it promote the credibility of the disciplinary system.

36. See text accompanying notes 55-67 *infra*.

ILLINOIS V. CALIFORNIA

What I see as a number of advantages in the Illinois system may be illuminated by comparing it to the more prevalent "commission form" of which California is generally regarded as the classic prototype.³⁷

The California commission is composed of five judges appointed by the supreme court, two lawyers appointed by the governing body of the state bar, and two non-lawyers appointed by the Governor with the concurrence of the senate. The commission combines within itself the functions which in Illinois are allocated between the Judicial Inquiry Board and the Courts Commission, although the California commission's adjudicatory power is subject to the revisory jurisdiction of the supreme court. The California Constitution provides that on recommendation of the commission

the Supreme Court may 1) retire a judge for disability that seriously interferes with the performance of his duties or is likely to become permanent, and 2) censure or remove a judge for action . . . that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.³⁸

If the California commission decides, after "preliminary investigation" to charge a judge with misconduct or disability, it institutes "formal proceedings" of an adversary nature.³⁹ The preliminary investigation and the charging decision immediately prior to the formal proceedings are analogous to the function of the Illinois Judicial Inquiry Board; the written notice to the judge of the institution of formal proceedings is like the complaint filed by the Illinois Board with the Illinois Courts Commission; and the "formal proceedings" are analogous to the hearing by the Illinois Courts Commission. There are several differences, however.

(1) In California's preliminary investigation, the judge is notified of the investigation, the nature of the charge, and the name of the person, if any, who made the verified statement which triggered the investigation. A verified statement is, however, not required and the California commission may make the investigation on its own motion.

In Illinois, the Judicial Inquiry Board need not notify the judge of the investigation (although it frequently does so) and it need not serve notice upon him of the nature of the charges until the investigation has come to the

37. The California Judicial Qualification Commission [hereinafter referred to in the text as the California commission] was established in 1960 and pioneered the development of the judicial disciplinary system as we presently know it. Its name has now been changed to the more descriptive "Commission on Judicial Performance."

38. CAL. CONST. art. VI, § 18(c).

39. CAL. CT. R. 905 (1971).

point at which there is reason to believe that there *may* be a reasonable basis for a complaint to the Courts Commission. Investigations are often closed without the judge ever knowing that somebody has complained about him. However, when it appears that the investigation may result in a complaint, the Board sends the judge what it calls its "rule 4(d) notice," apprising him of the charges that may be made against him and inviting him to appear before the Board (with counsel, if he so elects) to give such information, including the names of witnesses he may wish to have heard by the Board, as he desires. In the matter of notification to the judge that he is the subject of investigation, the difference between Illinois and California may be more apparent than real. William Braithwaite's study of the California procedures suggests that in practice the California commission often withholds the notice until it has determined "that a prima facie valid complaint does indeed have some factual basis."⁴⁰ In both Illinois and California the safeguards of adjudicatory due process attach only after the investigation is completed. In Illinois, this occurs when a complaint is filed with the Courts Commission; in California, it occurs at the time that "formal proceedings" are instituted.

(2) In Illinois, the alleged misconduct surfaces when a complaint is filed by the Board with the Courts Commission; in California, not until the commission, after completion of the "formal proceedings," has arrived at a recommendation of discipline, and has filed a record in the supreme court. Illinois' disclosure of the complaint when it is filed with the Courts Commission, and the public nature of the hearing or trial by the Commission, is, in my opinion, greatly to be preferred to California's maintenance of secrecy until an affirmative recommendation is made by the commission to the supreme court. I rest this mainly on the extent to which these several modes are apt to contribute to public confidence in the judicial institution.

(3) Illinois has divorced judicial discipline from the judicial system and legislative authority; California's commission operates under rules adopted by the Judicial Council of California and with powers granted by statute.⁴¹ I have said, frankly, that I believe that judicial discipline is too important to be left solely to the judges. It is, admittedly, a controversial subject but the trend of the times seems to me to support my misgivings about exclusive control of judicial discipline by the judiciary. Aside from whatever peculiarities we have had with the Illinois experience in dealing with judicial misconduct and disability, I think that the goal of public confidence is best served by a sharing of power between the judiciary and its customers.

40. See BRAITHWAITE, *supra* note 2, at 88.

41. See CAL. CONST. art. VI, § 18(e); CAL. CT. R. 901-922 (1977); CAL. GOV'T CODE § 68701-68755 (West 1976).

(4) While the California commission has a vital adjudicatory role, its determination, after a full adversary hearing, ends up as a *recommendation* to the supreme court which it may accept, modify or reject.

In Illinois, the decision of the Courts Commission is final and is not reviewable by the supreme court. While the ultimate decision-making power, in both states, is vested in judges, the distinction is, I think, a crucial one. The Illinois Courts Commission acts as a tribunal separate from, and independent of, the courts system, deriving its mandate directly from the constitution. That does, or should, have an impact on its perception of the role it is expected to play in the disciplinary process. I do not suggest that the California Supreme Court is any less accountable to the people of the state than the Courts Commission, but I think that the separation is desirable, not only in Illinois but in other jurisdictions, in order to ensure the effective functioning of the judicial disciplinary system.⁴²

(5) The California commission is rather obviously proud of the number of informal and unpublicized "adjustments" it has effected in administering the judicial disciplinary system. The impetus toward "informal," nonpublic disposition of cases of "less serious" judicial misconduct may have come from the fact that California initially provided for no sanction except removal from office. It was not until 1966 that censure was added to removal as an authorized sanction, and that the phrase "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" was added to the constitutional definition of judicial misbehavior.⁴³ The

42. Having the ultimate adjudicative power in the state supreme court becomes particularly embarrassing when charges are made against members of that court. A special tribunal must then be convened to substitute for the court. Florida has recently had that experience with serious charges brought against Justices Hal P. Dekle and Joseph A. Boyd, Jr. A special panel consisting of two retired supreme court justices, four circuit court judges, and a district court judge rejected the recommendation of the Judicial Qualifications Commission that the two justices be removed from office and limited the measure of discipline to a reprimand. See *In re Inquiry Concerning a Judge* (Hal P. Dekle), 308 So. 2d 5 (Fla. 1975), and *In re Inquiry Concerning a Judge* (Joseph A. Boyd, Jr.), 308 So. 2d 13 (Fla. 1975). The decision created a furor in the Florida legislature and the news media. An editorial in the St. Petersburg Times, for example, spoke of "this black day for the courts of Florida," characterized the special panel as one "picked by the majority political clique on the [supreme] court itself," and said that the "Boyd-Dekle episode clearly demonstrated that the process of disciplining both lawyers and judges should be removed from the hands of the Supreme Court." St. Petersburg Times, Feb. 5, 1975, § A, at 16, col. 1.

In 1977, the California Supreme Court was faced with a recommendation by the Commission on Judicial Performance that 82-year-old Associate Justice Marshall F. McComb be removed for misconduct. A special tribunal of seven court of appeals judges selected by lot was substituted for the supreme court. It overruled the recommendation of the Commission on Judicial Qualifications that Justice McComb be removed from office and more charitably ordered his retirement. See *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977).

43. CAL. CONST. art. VI, § 18(c).

necessity for fashioning some sanction for misconduct less draconian than removal from office may have been the mother of invention.

A recent constitutional amendment⁴⁴ now authorizes the California commission to admonish a judge privately about improper action or dereliction of duty. It also broadens "habitual intemperance," as a ground for discipline, to include the use of intoxicants or drugs.

Even in cases of the most serious kinds of judicial misconduct, one reads the literature about California with the sense that the objective of the disciplinary system is simply the separation from office of a judge who has been guilty of misconduct as discreetly, tactfully, and, above all, as *secretly* as possible.⁴⁵

As I have already suggested, the public interest is not served by cloaking in secrecy those remedial measures that are a justifiable response to judicial misconduct. "Publicity," as Mr. Justice Louis D. Brandeis once wrote, "is justly commended as a remedy for social . . . diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁴⁶

(6) In California, the same nine persons who comprise the commission make both the charging decision and the determination of guilt, although the "sentence," so to speak, is imposed by the supreme court on the commission's recommendation.

In Illinois, the Judicial Inquiry Board makes *only* the charging decision and a completely independent body, the Courts Commission, makes the determination of guilt and the measure of discipline.

While there is obviously some *internal* separation of these functions within the California commission, it seems to me the better part of wisdom, as well as consonant with recent developments in the area of administrative law, to allocate the functions between two independent agencies as the

44. See text accompanying note 38 *supra*.

45. Much of the claimed success of the California commission lies in its ability to "motivate" a judge to "voluntarily" resign or retire without a public airing of the charges against him. One observer credits the early effectiveness of the commission "largely to the indirect pressure it exerts on the judiciary." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 S.F. L. REV. 244, 257 (1969). See also BRAITHWAITE, *supra* note 2, at 93 (Braithwaite praises the California commission as both "effective and efficient" on the ground that it "encourages judges to resign or retire and thereby eliminates the time, expense and spectacle of a public trial in cases of serious misconduct").

I am uneasy with behind-the-scene maneuvers that "induce" or "encourage" or "motivate" resignation or removal. In Illinois, a judge may defeat the jurisdiction of the Courts Commission by resigning either before the complaint is filed or before the Courts Commission makes a decision. My inclination is to let the judge make the decision unaided by pressure exerted by the Board.

46. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *OTHER PEOPLES' MONEY* 62 (National Home Library Foundation ed. 1933)).

Illinois system does. While the due process clause of the fourteenth amendment⁴⁷ does not require it,⁴⁸ it is ancient wisdom that one ought not to be accuser and judge in the same cause.

(7) In Illinois, the Courts Commission is permanently convened and the same five judges (with an occasional alternate) hear *all* of the disciplinary cases en banc.

In California, much of the trial function is performed by a master or masters, appointed ad hoc by the supreme court for the particular case. The masters, who are judges or retired judges, submit findings of fact and conclusions of law which may include a recommendation for discipline of the judge or dismissal of the proceedings. The commission makes its determination on the master's report and the objections thereto.

It seems to me that Illinois has a manifest advantage in the continuity of service by the members of the commission, the expertise and sophistication they acquire, and the consistency which this lends to their opinions.⁴⁹ I do not know how acute the problem may be in practice, but I should not like to be responsible for "educating" new masters in each case to the peculiarities of this corner of our jurisprudence.

PROBLEM AREAS IN THE ILLINOIS SYSTEM

The 1970 Constitution became effective July 1, 1971. The initial membership of the Judicial Inquiry Board was filled on September 21, 1971, and the Board held its first meeting on October 6, 1971. However, its first appropriations bill was not passed by the General Assembly and approved by the Governor until May 26, 1972, and the Board began full operation immediately thereafter. We have thus had approximately five years of experience with the judicial disciplinary system. A discussion of some of the principal problem areas which have been encountered by the Board and the Courts Commission may be instructive.

Confidentiality

The Illinois Constitution provides that "[a]ll proceedings of the Board shall be confidential except the filing of a complaint with the Courts

47. U.S. CONST. amend. XIV, § 1.

48. The United States Supreme Court has held that combining investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication. *Withrow v. Larkin*, 421 U.S. 35 (1976). However, a biased decisionmaker is constitutionally unacceptable and "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

49. Since the Courts Commission's decisions on pre-trial motions are unpublished and difficult to come by, each respondent tends to "reinvent the wheel" in his case. Futile as it is, counsel still wish to argue, for example, that a judge's off-the-bench behavior is no business of the Judicial Inquiry Board, or that the constitutional standards are impermissibly vague or

Commission.”⁵⁰ While the reach of the term “proceedings” is not altogether unambiguous, a sensible reading of this provision would accord confidentiality to all those matters in which disclosure by the Board (except through a complaint filed with the Courts Commission or other matters of public record) would tend to make public accusations against a judge, or reveal the fact that an inquiry or investigation is pending against a judge, or serve to identify a lawyer or other person as the source of a complaint to, or investigation by, the Board. It would seem equally consonant with the manifest purpose of the provision that “confidentiality” does not extend to the Board’s rules, procedures or budget or inhibit public discussion of the way in which the members of the Board view their mission.

There is an obvious need for confidentiality in the investigative phase of the work of the disciplinary agencies. Without exception, all of the states have a provision comparable to the one in Illinois requiring that the proceedings of the agencies shall be confidential at least to the point of filing a complaint or the institution of formal proceedings. A judge’s reputation is not to be damaged by publicizing charges which are patently frivolous or which, after investigation, do not afford a reasonable basis for complaint. Confidentiality also serves the equally important purpose of protecting against reprisal the persons who bring their grievances to the Board and insures that the members of the agency may, in the investigative stage of the proceedings, speak candidly and forthrightly among themselves.

But confidentiality is a two-edged sword. The most stringent set of ethical standards is of little consequence unless the public is convinced that the standards are uniformly and vigorously enforced. If I am correct in suggesting that the ultimate value to be served by the disciplinary system is the maintenance of a deserved public confidence in the judiciary, I am disposed to believe that the Illinois system is preferable to the commission form in which the alleged misconduct of the judge never surfaces until the supreme court of the state has imposed a disciplinary sanction or an advisory recommendation has been filed with the court by the commission.

Once the Judicial Inquiry Board has determined that a reasonable basis exists to charge the judge, the complaint filed with the Courts Commission is public, the hearing on the complaint is public, and the decision which the commission makes is also a matter of public record. It may still leave the public unsatisfied with respect to complaints publicized in the news media but which the Board determines to be unworthy of complaint to the commis-

overbroad. Members of the Courts Commission who have “heard all that before” are apt to waste much less time in getting to the merits of the case.

50. ILL. CONST. of 1970, art. VI, § 15(c).

sion. But at least the public may be won to the confidence that when the Board has determined that there is reasonable basis for complaint, the alleged misconduct will not be swept under the rug. This is particularly important in light of the Illinois experience in dealing with judicial misconduct and disability.

In fact, opening the complaint and the hearing to public scrutiny is not an innovation in the 1970 Constitution. The rules adopted by the Supreme Court of Illinois for implementation of the 1962 Judicial Article,⁵¹ whatever their other shortcomings, provided that the complaint and the hearing should both be public.⁵² The committee appointed by the supreme court to draft the original rule 59-2⁵³ reported, with the evident approval of the court, that:

The Committee gave considerable thought to the question of whether the hearing should be public. At first there were serious doubts of the wisdom of a public hearing on the ground that a public hearing which resulted in the vindication of the judge might nevertheless be so damaging to his position as to render him ineffective and, in addition, subject him to undue personal embarrassment and abuse On balance, the Committee finally concluded unanimously *that in order to have the confidence of the public in the effectiveness of the commission, which is an important reason for the inclusion of this provision in the Judicial Article, it will be necessary to make the hearings public.*⁵⁴

The emphasis I have placed on openness as a guarantor of the integrity of the disciplinary process is thus not a new idea in Illinois. Confidentiality and credibility are seldom compatible bedfellows in a democracy; public confidence is generally ill-served by secrecy. Too often, as Edmund Burke reminds us, "where mystery begins, justice ends."

I consider the fact that no mantle of secrecy or confidentiality obscures the work of the Courts Commission or the postcomplaint performance of the Board to be a particular virtue of the Illinois system. But the Board's processes in that vast majority of investigations which do not result in the filing of a complaint with the commission are subject to no such public scrutiny. The Board, in fact, is virtually immune from informed criticism. There seems to be no alternative that would not involve an unacceptable sacrifice of the value of confidentiality in the Board's proceedings, a requirement that necessarily prohibits any explanation of why the Board did not, in a given case, find a reasonable basis for complaint or how the Board has exercised its prosecutorial discretion. It does, however, leave the Board

51. ILL. REV. STAT. ch. 110A, § 51 (1965).

52. *Id.* § 51(c), (e).

53. This is former rule 59-2, adopted and effective May 18, 1964, with minor language changes. See also note 7 *supra*.

54. ILL. ANN. STAT. ch. 110A, § 51(d) (Smith-Hurd 1968) (emphasis added).

at the mercy of suspicion that it is not always as fiercely independent and courageous as it would hope all judges to be.

*The Sources from Which the Illinois Judicial Inquiry Board May
Derive the Meaning of the Constitutional Standards*

The Board is required by the constitution to determine whether a reasonable basis exists to charge a judge with a violation of one of several broadly defined species of misconduct.⁵⁵ They are expressed as "willful misconduct in office, persistent failure to perform [the duties of the judicial office] or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute"⁵⁶

These words are, in truth, less definitions than invocations of spirit. A criminal statute which defined prohibited conduct in such general terms would manifestly be open to the challenge that it was constitutionally vague and overbroad. There is ample authority, however, that in a disciplinary context, as applied to lawyers and judges, the terms are not vulnerable to the doctrine of overbreadth. *Napolitano v. Ward*⁵⁷ furnishes, for Illinois, as close to a conclusive precedent as one might be fortunate to find on any constitutional question.

Richard A. Napolitano, a judge of the Circuit Court of Cook County, was removed from office by the "old" Illinois Courts Commission on July 14, 1970. The charges against him stemmed from a Sangamon County grand jury investigation into the purchase and sale of concession contracts at the Illinois State Fair in which Napolitano was called as a witness but claimed the protection of the fifth amendment against self-incrimination⁵⁸ and agreed to testify only after being granted immunity from prosecution.⁵⁹ The commission acted under the 1962 Judicial Article (the 1970 Constitution had not yet been adopted) which provided no more precise standard for removal than the words "for cause."

55. ILL. CONST. of 1970, art. VI, § 15(c).

56. *Id.* § 15(c)(1).

57. 317 F. Supp. 79 (N.D. Ill. 1970) (three-judge panel terminated for lack of constitutional question) and 317 F. Supp. 83 (N.D. Ill. 1970) (preliminary injunction denied), *aff'd*, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972), *rehearing denied*, 410 U.S. 947 (1973).

58. U.S. CONST. amend. V.

59. By March 19, 1970, when the complaint against Napolitano was filed, the supreme court had adopted the rules change (June 27, 1969) which restructured the commission and the lessons of recent history had obviously not been lost on either the supreme court or the commission. The commission's decision in *Napolitano* came on July 14, 1970, while the debate over "who judges the judges" was still raging in the constitutional convention then in session.

The commission found that there was clear and convincing evidence that Napolitano had violated applicable Canons of Judicial Ethics including Canon 4 of the code adopted by the Illinois Judicial Conference ("A judge's conduct should be free from impropriety and the appearance of impropriety . . . and his personal behavior not only upon the bench . . . but also in his everyday life, should be beyond reproach") and had given "cause," within the meaning

On a claim by Napolitano that the words "for cause" were unconstitutionally vague and overbroad, a three-judge panel of the United States District Court for the Northern District of Illinois found the contention to be so lacking in merit as to raise no substantial constitutional question.

The words 'for cause' are, in our opinion, sufficiently definite and are not overly broad and they therefore do not raise a question of constitutionality of the Illinois constitutional provision and the rule thereunder. The other matters raised by Napolitano pertain to the application of the Illinois constitutional provision and the rule thereunder and a determination of whether their application to him was 'cause,' which in our opinion does not contemplate, or require, a three-judge decision.⁶⁰

In a subsequent decision⁶¹ the district court refused any further examination of the argument that the "for cause" standard was constitutionally vulnerable and quickly disposed of the other challenges Napolitano made to the constitutionality of the removal proceedings. It said that while a judge may invoke the fifth amendment, the "spectacle . . . is not a pretty one" and might itself be cause for removal.⁶² As to the use against Napolitano, in the commission's proceedings, of his testimony compelled under grant of immunity, the court held that the proceedings were not criminal in nature and that there was no constitutional infirmity in the reliance on his grand jury testimony. The court hearkened back to the pointed observation in *Jenkins v. Oregon State Bar*⁶³ that "[t]here is no divine right of judges to flout the law."⁶⁴ Lastly it found that no evidence had been adduced to support Napolitano's claim that the commission's decision had been based upon his "ancestral (*sic*), ethnic and vocational associations" in violation of the equal protection clause of the fourteenth amendment.⁶⁵ The Court of

of the Illinois Constitution, for his removal from office. *Napolitano v. Ward*, 457 F.2d 279, 282 & n.4 (7th Cir. 1972). He had refused to testify before the grand jury until granted immunity; had used fictitious names in a scheme to acquire a large number of State Fair concession contracts and sublet them, at a profit, to various concession stand operators; and had accepted sums of money from a dairy firm to use his influence to secure a favorable location for it at the fairgrounds. *FIEDLER*, *supra* note 2, at 426.

60. 317 F. Supp. 79, 81 (N.D. Ill. 1970). *Napolitano* is instructive for a good many reasons beyond its vindication of "for cause" as a standard for removal. In one way or another, before every available judicial forum, Napolitano exhausted every conceivable objection to the constitutionality of the removal procedures. He filed a "purported appeal" to the Illinois Supreme Court which the court rejected out of hand in an unsigned order, on the ground that no right of appeal existed from the commission's decision. *See FIEDLER*, *supra* note 2, at 428. Another attempted appeal to the United States Supreme Court was given the same short shrift in an order dismissing it for want of a substantial federal question. 401 U.S. 95 (1971). He then resorted to the proceedings in the United States district court. *See* text accompanying notes 61-67 *infra*.

61. 317 F. Supp. 83 (N.D. Ill. 1970).

62. *Id.* at 85.

63. 241 Or. 283, 405 P.2d 525 (1965).

64. *Id.* at 291, 405 P.2d at 529 (cited at 317 F. Supp. at 85).

65. 317 F. Supp. at 85.

Appeals for the Seventh Circuit affirmed⁶⁶ and certiorari and a subsequent petition for rehearing were denied by the United States Supreme Court.⁶⁷

If "for cause" is sufficiently definite to pass muster under the fourteenth amendment, such standards as "conduct that brings the judicial office into disrepute" are surely no more vulnerable to challenge as vague or overbroad. Indeed, the first commission convened by the Illinois Supreme Court under the 1962 Judicial Article equated the words "for cause" with "conduct unbecoming a judicial officer tending to bring the court system into disrespect or disrepute."⁶⁸

Against this background, the Board, as early as its first meeting, considered the sources to which it might look to inform and illuminate the constitutional standards. It was not particularly dismayed by the fact that the constitution had failed to provide some *vade mecum* of judicial behavior against which it might determine when a judge was guilty of misconduct. There is, of course, a vast body of literature on the subject, ranging from the Bible, through Aristotle and Plato, to the various canons of judicial ethics and codes of judicial conduct adopted by bar associations, judicial conferences, and the courts. None of it can serve to define everything that may constitute conduct prejudicial to the administration of justice or that brings the judicial office into disrepute, notwithstanding the longing of judges, no less than other human beings, for certainty in their daily comings and goings. However, the Board was confronted by the fact that the same 1970 Constitution in which it finds its mandate provides that "the Supreme Court shall adopt rules of conduct for Judges and Associate Judges."⁶⁹

In January 1970 (in the wake of the 1969 "crisis of confidence" in the judiciary and before the adoption of the 1970 Constitution), the court adopted a commendable set of "Standards of Judicial Conduct"⁷⁰ drafted by a committee headed by Dean John E. Cribbet of the University of Illinois College of Law which it has apparently been content to have stand as

66. 457 F.2d 279 (7th Cir. 1972).

67. 409 U.S. 1037 (1972), *rehearing denied*, 410 U.S. 947 (1973).

68. *In re* Murphy, Assoc. Judge of Circuit Ct. of Cook County, No. 1177 (Ill. Cts. Comm'n June, 1968).

69. ILL. CONST. of 1970, art. VI, § 13(a).

70. The standards are embodied in Supreme Court Rules 61 through 71. ILL. REV. STAT. ch. 110A, §§ 61-71 (1975). In view of the emphasis I have placed on public confidence in the judiciary as the primary end of the disciplinary system, it is worth noting that the Cribbet Committee struck the same theme in these eloquent words:

Public confidence in the administration of justice is an indispensable requisite of any civilized society. The rule of law in a free society cannot long survive without public trust in the competence, integrity and impartiality of the judiciary. Public confidence has been shaken by recent events on the national and state level and prompt efforts must be exerted to restore and increase a deserved trust in the rule of law.

Judges as individuals are subject to all of the pressures on any man in public life but judges as judges are in a class apart. They must avoid all impropriety and, more difficult to attain, even the appearance of impropriety. Nothing less will suffice. The

compliance with this provision.⁷¹ The standards are probably no more precise, however, than the constitutional standards. From the standpoint of "definiteness" there is not much to choose between an injunction to "avoid the appearance of impropriety" and an injunction not to engage in "conduct that brings the judicial office into disrepute."

The Board might conceivably have chosen to regard the supreme court's rules as an exclusive compendium of all conduct that offends the constitutional standards. There is, however, nothing in the 1970 Constitution to suggest that the mandate of the Board and the Courts Commission is limited to the enforcement of whatever rules of conduct the supreme court may adopt. Had that been the intention, it could have easily been expressed. There would have been no need to speak of "conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute." Indeed, the Report of the Judiciary Committee of the Convention says of the constitutional standards that:

Although the standards may appear general, they are in fact grounded in a long professional history of definition and application. The canons of judicial ethics promulgated by the National and State Bar Associations, as implemented by ethical standards established by courts, give adequate notice to judicial officers of the kinds of conduct which are proscribed.⁷²

The Board reached the conclusion, of which it gives notice in its rule 4(c) that:

In determining whether a reasonable basis exists (to charge a judge with "willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute"), the Board may be guided by (but shall not be limited to) the Standards of Judicial Conduct adopted by the Supreme Court of Illinois (Rule 61) and the rules of the Supreme Court (Rules 62 through 71) related thereto.⁷³

This seems so sensible a reading of the constitution that I would hardly characterize it as a "problem area" were it not for the fact that it has become

judge must expect to be the subject of constant public scrutiny and must conduct himself accordingly. He must accept restrictions and prohibitions on his conduct which might be viewed as burdensome by the ordinary citizen, and he should do this freely and willingly. Otherwise, he should not seek the awesome responsibility of a judge.

REPORT AND RECOMMENDATIONS OF THE ILLINOIS SUPREME COURT COMMITTEE ON JUDICIAL ETHICS I (1969).

71. The court has made a few relatively minor changes in the standards since adoption of the Illinois Constitution of 1970, but has resisted the recommendations of the bar that it integrate the standards with the American Bar Association Code of Judicial Conduct. Illinois is one of the very few states that has not adopted the American Bar Association Code of Judicial Conduct.

72. VI PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 871 (1970).

73. ILL. JUDICIAL INQUIRY BD. R.P. 4(c).

a focal point of attack by members of the judiciary. One critic (writing for what I think is a readily identifiable constituency) attacked rule 4(c) as "unconstitutionally vague," as "an undefined and undefinable rule of substance," as representing "the greatest lack of restraint in modern history," and as an "emasculating threat to the independence of the judiciary."⁷⁴ This criticism seems to evidence less scholarship than unreasoning hostility to the judicial disciplinary system.⁷⁵

Neither the supreme court nor the Courts Commission, despite ample opportunity to do so, has given an indication that the supreme court's rules are the only legitimate source of inspiration in determining whether a judge has been guilty of actionable misconduct. Nonetheless, the constitutional standards are not self-defining and the judicial disciplinary process in Illinois can benefit greatly from a body of doctrine developed in the case-by-case decisions of the Courts Commission.

Does the Disciplinary System Have "Jurisdiction" of Judicial Misconduct which is Reviewable on Appeal?

It had not occurred to me until quite recently that any serious contention could be made that judicial misconduct was beyond the reach of the disciplinary system simply because it might also constitute error reviewable on appeal. Appellate review is so expensive and time consuming that it is hardly a realistic remedy in cases in which little of monetary value is involved but where a person has suffered the slings and arrows of judicial rudeness, discourtesy and incivility, or the arrogant abuse of judicial power. The issue has, however, come into sharp focus in the case of *In re Harrod*⁷⁶ and is worthy of attention.

It was charged by the Judicial Inquiry Board that Judge Harrod had in a number of cases ordered defendants to have short haircuts (apparently on the theory that long hair was an intolerable manifestation of an antisocial attitude), and had required defendants sentenced to probation or conditional discharge to surrender their driver's license to the probation officer who would then issue a certificate to the defendant to the effect that the defendant did have a valid driver's license which had been posted with a probation officer during the period of probation or conditional discharge. The intended effect was to identify the defendant as a probationer on any occasion in which he was requested to exhibit his driver's license either to police officers or to others.⁷⁷

74. Doherty, *Judges Are Not Second-Class Citizens*, 62 ILL. B.J. 274, 275 (1974) [hereinafter cited as *Second-Class Citizens*].

75. For my response to Mr. Doherty's criticism, see Greenberg, *Judges Are First Class Citizens and a Good Deal More*, 62 ILL. B.J. 378 (1974).

76. *In re Harrod*, No. 76-CC-3 (Ill. Cts. Comm'n December 3, 1976).

77. *Id.* at 7-8.

The respondent strongly urged upon the commission, with the support of a lengthy amicus brief by the Illinois Judges Association, that the commission has no *jurisdiction* to entertain a complaint by the Judicial Inquiry Board which charges a judge with improper conduct with respect to the entry of an order subject to review by the ordinary appellate processes.⁷⁸

The Courts Commission acknowledged the fact that the judge's conduct was at least theoretically subject to review in the normal course of judicial proceedings and the risk that the appellate or supreme court might reach a conclusion with respect to this conduct at variance with the commission's view. But the commission equally recognized that "many serious injustices may occur for which the right of appeal is not an effective remedy."⁷⁹ It rejected the jurisdictional argument but announced, with some caution, that it would "undertake to impose discipline based upon the conduct of judges which is subject to review with ordinary judicial proceedings" only in the "clearest cases in which a gross abuse of judicial power has been demonstrated."⁸⁰

Implicitly finding that Judge Harrod's "haircut orders" and driver's license cases presented one of those "clearest cases" of "gross abuse of judicial power," the commission suspended him without pay for a period of one month.

Judge Harrod then applied to the supreme court for leave to file "a petition for writ of prohibition, or alternatively for writ of mandamus, or alternatively for writ of certiorari" against the Courts Commission and the five judges of the commission.⁸¹ He was represented, on the motion, both by the attorney who defended him before the Courts Commission and the attorney who submitted the amicus brief to the commission on behalf of the Illinois Judges Association. The supreme court initially denied the motion,

78. *Id.* at 2-3.

79. *Id.* at 10.

80. *Id.* It is not altogether clear what this means in the case of on-the-bench misconduct such as rudeness and discourtesy, intemperateness, inattention, and a wide range of other improprieties which may not affect the outcome of the litigation. Presumably the Courts Commission's reference "to review with ordinary judicial proceedings" is intended to apply to cases in which there is, in reality, a meaningful opportunity for appellate review.

81. Judge Harrod's motion for relief from the order of the Courts Commission, perhaps only for good measure, also charged that the Board has "unconstitutionally seized powers expressly withheld by the Constitution . . . and [has] exceeded its constitutional authority in investigating the decisions of judges in the exercise of their judicial discretion," and that the Board and the Courts Commission had no right to premise any complaint on misconduct which was not violative of the Standards of Judicial Conduct adopted by the Illinois Supreme Court. Motion for Leave to File a Petition for Writ of Prohibition, or Alternatively for Writ of Mandamus, or Alternatively for Writ of Certiorari at 6, *People ex rel. Harrod v. Illinois Cts. Comm'n*, No. 49118 (Ill. Dec. 1968). This is, of course, a reference to the Board's rule 4(c) discussed in the text accompanying note 73 *supra*.

The rule 4(c) argument is hardly relevant in *Harrod* in view of the finding by the Courts Commission that the judge's conduct specifically violated rule 61(c)(18) of the supreme court's

but on reconsideration granted leave to file a petition for writ of mandamus.⁸²

Judge Harrod's out-of-court reaction to his suspension seems to reflect the same lack of insight into the limitations on judicial power in a democracy that brought him to the attention of the Judicial Inquiry Board in the first place. Judge Harrod is reported as having told a Kiwanis Club that his suspension "has intimidated every judge in the state;" that "every judge who looks at a defendant is wondering, is he going to turn me in; is his lawyer going to turn me in?"⁸³ "What it boils down to," Judge Harrod is quoted as saying, "is that they didn't like the haircuts."⁸⁴

Prosecutorial Discretion and the "Station House Adjustment"

While the Illinois Constitution of 1970 says no more on this subject than that a complaint may be filed by the Board whenever five of its members believe that a reasonable basis exists to charge the judge with misconduct or disability,⁸⁵ it is inescapable that the Board, in making that determination, exercises "prosecutorial discretion."

The vast influence of the prosecutor in the pretrial criminal process, characterized by one commentator as "largely unconfined, unstructured and unchecked,"⁸⁶ has in recent years become an increasing concern in our criminal justice system. "Selective" prosecutions and the grant of immunity to some guilty parties in aid of the successful prosecution of others are facets of the great discretion to prosecute or not to prosecute, to charge a serious offense or a lesser offense, to give one person a "pass" but to "throw the book" at another. The element of prosecutorial discretion cannot be eliminated from the Board's function, but it is important that the exercise of this discretion shall not be completely "standardless." It must not, in any event, be arbitrary or capricious or totally lacking in objectivity.

Given the necessarily imprecise nature of the constitutional standards and the lacunae which must exist in any code of judicial conduct, the charge

Standards of Judicial Conduct which reads, in part, as follows: "In imposing sentence, a judge should follow the law and should not compel persons brought before him to submit to some act or discipline without authority of law, whether or not he may think it would have a beneficial corrective influence" ILL. REV. STAT. ch. 110A, § 61(c)(19) (1975).

82. The initial denial was announced in a letter from the clerk of the supreme court to the attorneys of record. Letter from Clerk of the Illinois Supreme Court to William J. Harte (Jan. 19, 1977). The subsequent order granting leave to file an application for a writ of mandamus was similarly announced. *People ex rel. Harrod v. Illinois Cts. Comm'n* No. 49118 (Ill. March 16, 1977). On November 30, 1977, the writ was awarded, *People ex rel. Harrod v. Illinois Cts. Comm'n*, No. 49118 (Ill. November 30, 1977). See text accompanying notes 120-160 *infra*.

83. Peoria Journal Star, Jan. 5, 1977, § E, at 1, col. 4.

84. *Id.*

85. ILL. CONST. of 1970, Art. VI, § 15(c).

86. See, e.g., Friedman, *Some Jurisprudential Considerations in Developing an Administrative Law for the Criminal Pre-Trial Process*, 5 J. URBAN L. 433, 435 (1974).

that a judge may be accused of misconduct "on nothing more than [the] subjective notions of current members of the Board"⁸⁷ is not altogether lacking in credibility. While I have already paid my respects to what I think is the wholly specious contention that the standards are unconstitutionally vague or overbroad, the fact remains that the Board's prosecutorial discretion holds a potential for abuse, not only from the standpoint of the judges but, even more importantly, from the standpoint of the public interest.

It is no more likely that the Board can be justly accused of excessive zeal than of undue caution and timidity. But the fact that the charging decision is effectively shielded from public scrutiny by the requirements of confidentiality is an anomaly in the disciplinary system. Overzealousness on the part of the Board is correctable by the Courts Commission; passivity and timidity may not even come to public notice.

The exercise of prosecutorial discretion by the Board is complicated by the fact that the constitution gives it no express authority to impose any sanction, public or private, upon a judge. I consider it extremely doubtful that any such power can be read into the constitution by implication. There is a sentence in the Report of the Committee on the Judiciary of the Convention⁸⁸ that lends some credence to the idea of station house adjustments. It says: "Indeed the Committee envisions the informal resolution of many complaints by understandings reached with the judge or magistrate which are adequately remedial and where there will be no cause to proceed to a formal complaint." The constitution does not, however, reflect this vision and I do not regard it as a warrant for the imposition of sanctions, formal or informal, by the Board. In any event, what is "adequately remedial" must obviously be measured by how well or how poorly "understandings reached with the judge or magistrate" serve the ends of the disciplinary system.

Certainly a *public* reprimand or censure by the Board would fly directly into the teeth of the confidentiality of the Board's proceedings. However, even a *private* reprimand or censure, or a demand that the judge acknowledge his fault to the Board and promise to "sin no more," is a sanction that must be premised on a finding that the judge has in fact been guilty of conduct that is proscribed by the constitutional standards.

It is my view that the imposition of any sanctions by the Board would be an impermissible usurpation of the authority vested in the Courts Commission. It would, moreover, require the fashioning of a new procedure to afford an adversary hearing, rights of confrontation and cross-examination, etc., in dealing with any investigation which might result in imposition of a

87. *Second-Class Citizens*, *supra* note 74, at 274.

88. VI PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 870 (1970).

private reprimand or censure, for I am convinced that no sanction, private or public, is permissible unless it is firmly grounded upon a finding of guilt.

Notwithstanding all of this, it is repeatedly urged upon the Board that it ought to avoid filing complaints by resorting to what is accurately, if inelegantly, sometimes called the "station house adjustment." There are, of course, many instances of aberrant behavior brought to the attention of the Board which do not rise to the dignity of misconduct deserving of reprimand or censure. In such cases it is appropriate that no complaint should be filed by the Board. It is, however, in most such instances, also unnecessary that the Board administer some formal warning or admonishment. The point is seldom lost upon a judge who is called upon to explain his conduct to the Board.⁸⁹

I would probably have no irreconcilable objection to station house adjustments if I could be reasonably certain that the Board's discretion will be properly exercised. I think that the Board is on safer ground, however, if it continues to avoid the dubious temptation to embark upon informal remedies of its own invention and draw a fairly rigid line between conduct which it believes offends the constitutional standards and conduct which it believes does not. In the former, a complaint should be filed; in the latter, the Board really has no constitutional authority to act. I confess that I regard the value of disclosure of judicial misconduct as so central to the judicial institution that I view with some suspicion any suggestion that tends to compromise it. The public will inevitably regard it with even greater suspicion. And that, too, is part of the Illinois experience to which the Judicial Article of the 1970 Constitution is addressed.

I have no facile solutions to this problem of the Board's prosecutorial discretion. It is the one place in the disciplinary system in which the public must trust blindly not only the integrity but the individual perceptions of the members of the Board. If the fates are kind, these perceptions will be as informed and "educated" as possible; and the Board will find that full measure of self-discipline, courage, toughmindedness and good judgment without which the system will not work. It is a fairly sizeable order.

"Due Process" in the Board's Proceedings

The Illinois Judges Association has repeatedly urged that the filing of a complaint, without a hearing before the Board at which the judge under investigation is accorded the right to counsel, confrontation and cross-examination, violates the fourteenth amendment of the Federal Constitu-

89. Where, however, the judge persists in his belief that his conduct was proper, a private admonishment will serve no useful purpose. On the whole I think the view of theologians that there can be no redemption without "conviction of sin" may be right.

tion.⁹⁰ The argument disregards the difference between a *complaint* and a *judgment*, and fails to distinguish between the Board's function as an investigative-charging agency, and the Courts Commission's function as the sole decision-maker with respect to any action that can be said to deprive the respondent of a property or liberty interest.

The judge is, of course, afforded the full panoply of adjudicative due process in the de novo hearing before the Courts Commission. However, he is not also entitled to the same rights before the Board so long as the Board is prudent enough to limit itself to its constitutional investigative and prosecutorial function and does not seek to usurp the powers of the commission by imposing sanctions on the judge. The question does not, in my judgment, present a serious constitutional issue.

The decisions of the United States Supreme Court in *Hannah v. Larche*⁹¹ and *Jenkins v. McKeithen*⁹² firmly establish the distinction between investigatory proceedings and adjudicatory proceedings insofar as procedural due process is concerned. We need not be reminded that "due process" is not a magical incantation. As the Supreme Court said in *Hannah*, due process is an elusive concept that

embodies the differing rules of fair play which, through the years, have become associated with different types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.⁹³

Hannah was concerned with the validity of procedures adopted by the Federal Commission on Civil Rights⁹⁴ created by the Civil Rights Act of 1957⁹⁵ and with the requirements of due process as applied to the proceedings of the commission. The Court held that persons summoned to testify in an investigation by the commission, who were targets of the investigation, were not entitled to the safeguards of appraisal, confrontation, and cross-examination which are traditionally associated with adjudicatory proceedings.

The Supreme Court's characterization of the Civil Rights Commission in *Hannah* is entirely apt when applied to the Illinois Judicial Inquiry Board:

90. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

91. 363 U.S. 420 (1960).

92. 395 U.S. 411 (1969).

93. 363 U.S. at 442. *See also* *Morrissey v. Brewer*, 408 U.S. 471 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481).

94. 42 U.S.C. §§ 1975-1975(e) (1970).

95. *Id.*

It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.⁹⁶

The Court, after an extensive survey of the procedures traditionally followed by investigating agencies, concluded that:

We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of appraisal, confrontation, or cross-examination. Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the Civil Rights Commission, we mention them, in addition to the executive agencies and commissions created by Congress, to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government.⁹⁷

The Supreme Court reaffirmed *Hannah* in *Jenkins v. McKeithen*.⁹⁸ Mr. Justice Harlan's description in his dissenting opinion in *Jenkins* of certain federal administrative agencies and the offices of prosecuting attorneys seems also to furnish an apt description of the Illinois Judicial Inquiry Board:

None of [these agencies] is the *final* arbiter of anyone's guilt or innocence. Each, rather, plays only a *preliminary* role, designed, in the usual course of events, to *initiate* a subsequent formal proceeding in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies could not otherwise practicably pursue their investigative functions, they have not been required to follow "adjudicatory" procedures.⁹⁹

One may concede that while the Board adjudicates nothing, the mere fact of filing a complaint with the Courts Commission may, in the eyes of the press or the public, damage the respondent judge in a way which may not be fully repaired even if the Courts Commission "acquits" him. I think that this risk is exaggerated,¹⁰⁰ but at any rate it is not a reason for

96. 363 U.S. at 441.

97. *Id.* at 449.

98. 395 U.S. 411 (1969).

99. *Id.* at 439 (Harlan, J., dissenting).

100. A substantial number of judges who have been reprimanded, censured, or suspended without pay by the Courts Commission are alive and well and still occupy judicial office. Several of them have been retained in office by popular vote and one or two may even have

emasculating the investigative and prosecutorial process so long as the judge is entitled to his day in court and a fair trial before the Courts Commission. In this, as in other aspects of our society, we must rely, as the United States Supreme Court observed in *United States v. Ash*,¹⁰¹ upon the "ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows' but 'not foul ones.'"¹⁰²

Even if it were true that the filing of a complaint by the Board irreparably damaged the judge's good name, reputation and opportunity to be retained or reelected, it would have to be accepted as an "occupational hazard" of judicial office. It would implicate no "liberty" or "property" interest "sufficient to invoke the procedural protection of the 'Due Process Clause.'"¹⁰³ So long as no sanction can be imposed upon the judge except by the Courts Commission after a de novo adversary hearing in which he is afforded adjudicatory due process, even a temporary suspension with pay pending the decision of the commission does not offend the due process clause of the fourteenth amendment.¹⁰⁴

Notwithstanding the protestations of the Illinois Judges Association to the contrary, the Board has, in my opinion, accorded to the judges a full measure of the due process rights which are appropriate to the nature of its proceedings. The Board has indeed gone beyond the requirements of due process by imposing upon itself, under its rule 4(d),¹⁰⁵ a requirement that before it proceeds to a determination that a reasonable basis exists for the filing of a complaint, the judge shall be given

notice of the substance of the proposed charge and an opportunity to appear before the Board (accompanied by counsel if the Judge so elects) to make such statement or give such information, oral or written (including the names of any witnesses he may wish to have heard by the Board), in respect to the proposed charge as he may desire.¹⁰⁶

Against the background of Illinois political and judicial history, the persistent demand that the Board hold an adversary trial-type hearing *cum* appraisal, confrontation, and cross-examination before it may even file a complaint with the commission, engenders a suspicion that it stems less from any conviction that this is required by the due process clause than by

become folk heroes in their communities as the result of the confrontation with the Courts Commission. It is to be hoped, however, that they are better judges by reason of the experience. In any event, I find no empirical evidence in Illinois that disciplinary action short of removal has irreparably harmed a judge's reputation or significantly affected his opportunity for continued employment.

101. 413 U.S. 300 (1973).

102. *Id.* at 320.

103. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

104. *See Arnett v. Kennedy*, 416 U.S. 134, 157 (1974).

105. ILL. JUDICIAL INQUIRY BD. R.P. 4(d).

106. *Id.*

the knowledge that it would cripple the Board's ability to perform its investigative function. I do not suggest that due process should be measured out grudgingly or that the Board should not go beyond the requirements of the fourteenth amendment and the Illinois Constitution if there were a compelling need to do so. But to yield to the demand to convert the two-tier system into a "two-trial" system would, in Shakespeare's words, be "some love but little policy."

AFTER FIVE YEARS—A PERSONAL ASSESSMENT

There is, here, a dilemma. On the one hand, having written at length a statement about the history and structure of the Illinois judicial disciplinary system, I may justly be asked to make some assessment, tentative and personal as it may be, of how well the system has worked in its first five years of operation. On the other hand, the requirements of confidentiality, and a decent regard for the sensibilities of my colleagues on the Judicial Inquiry Board, inhibit the frankness and candor which I should like to bring to the subject. No effort at redaction or excision in discussing "proceedings" of the Board would be apt to save me from embarrassment if I should inadvertently cross the fine line between what is appropriately confidential and what is not. I shall, nonetheless, but with what I hope is a forgivable degree of circumspection, make an effort at a personal (I stress the word *personal*) assessment of the performance, thus far, of the Illinois disciplinary system.

The Judicial Inquiry Board

On the whole, the Board has functioned better than I had anticipated and not as well as I had hoped. The performance during the five years has been uneven. The Board got off to a good start.¹⁰⁷ Considering that it was writing on a clean slate, with no significant precedent for the implementation of a two-tier system, it did an excellent job of getting organized, adopting rules of procedure, and charting a path for its administration. The Board has already had a profound impact in heightening the expectations and awareness by the judiciary of what is expected of judges in their behavior both on and off the bench.

It is, however, my judgment that the Board is far from having accomplished its full potential. It has shown no great flair or imagination in

107. However, not without some initial trauma. The antireform forces, led by the loyalists of the Chicago Democratic party machine who had failed to abort the judicial disciplinary system in the constitutional convention, almost succeeded in killing the baby at birth. On one pretext or another the Illinois Senate managed to withhold an appropriation for the Board until the concluding moments of the legislative session in May 1972. Only a vigorous campaign in the news media saved the day. See COHN, *supra* note 2, at 154, and FIEDLER, *supra* note 2, at 431.

carrying out its mission. On the whole, it has tended, perhaps as a function of too limited a staff, to react to specific complaints which it receives, rather than to initiate sua sponte inquiries into broader problems of judicial conduct prejudicial to the administration of justice. Nobody, least of all I, has a desire to turn loose a small army of snoopers on fishing expeditions into judicial behavior. I would resist any such course even if the Board had an unlimited budget and inexhaustible staff. The mischief caused by undue invasion of the privacy of judges would far exceed any benefit that might be derived from it. While judges, by accepting judicial office, sacrifice a good deal of the right to privacy in their personal affairs which other citizens enjoy, they have a right to be free of unnecessary intrusions by the Board. But there is a strong need for systematic monitoring of courts in which the Board has reason to believe that the judges are consistently falling short of the requirements of the Illinois Standards of Judicial Conduct¹⁰⁸ and the American Bar Association Code.¹⁰⁹ The Board has yet to establish an adequate capability for that task.

In particular, the Board has shown no observable vigor in carrying out that part of its constitutional mission that calls upon it to determine when judges have become "physically or mentally unable to perform [their] duties."¹¹⁰ It is, of course, a most disagreeable task. Unlike blatant judicial misconduct, the misfortune of illness, the lot of all humankind, can only arouse sentiments of sympathy and compassion. But it is necessary to temper these feelings with an understanding that it is right that a judge who can no longer perform his duties shall leave the office lest the business of the courts, already intolerably overcrowded, should suffer and an undue burden be cast upon his brethren. Here, again, a systematic monitoring capability should be established. As it is, the Board's first knowledge that a judge is physically unable to perform his duties is often derived from an obituary notice that reports that he has passed away after a long and lingering illness.

As of the end of 1976, the Board had taken twenty complaints to the Courts Commission. In nineteen of these cases, the commission imposed some measure of discipline ranging from reprimand to removal from office.¹¹¹ The fact that the Board has successfully prosecuted so large a percentage of its complaints is not, to my mind, necessarily cause for congratulation. It may bespeak not only diligent and careful preparation, but too excessive a degree of caution. The Courts Commission is, of course, powerless to act except upon the Board's initiative, and if the Board "plays

108. ILL. REV. STAT. ch. 110A, §§ 61-71 (1975) (Sup. Ct. Rs. 61-71).

109. American Bar Association Code of Judicial Conduct (adopted Aug. 16, 1972).

110. ILL. CONST. of 1970, art. VI, § 15(c)(2).

111. See Appendix B.

it too safe," the cause of improving the moral and ethical perceptions of what judges "ought" to be, may be disserved. The Board ought not to have a prosecutor's concern about "batting averages."

The Courts Commission

Anything like an adequate study of how well the Courts Commission has functioned is beyond the necessary limitations of this article. But I make these observations:

If I have any disappointment in the performance of the Courts Commission, it lies with the fact that it has shown little emotion or passion for its task. I recognize that "emotion" and "passion" are not usually commendable qualities in a judge. I mean it here only in the sense that the commission has apparently viewed the task as a disagreeable one to be performed with a minimum of rhetoric rather than as an opportunity, by example and precept, to help establish a climate of heightened expectations by the community of judges about their own conduct, and the consequences of violation of fundamental norms of judicial behavior. I sense that the commission regards the disciplinary system as a kind of necessary nuisance to be dealt with justly but not overly warmly or with great enthusiasm. At any rate, I doubt that the commission as a whole feels as strongly about the values of disclosure as I do.

There was a time when I believed—even in the field of judicial ethics—with Dr. Ernst Freund, one of my law school teachers, that "[n]ot every standard of conduct that is fit to be observed is also fit to be enforced."¹¹² Surely that made sense when Dr. Freund wrote it sixty years ago and is by now a virtual commonplace. Why, then, a zeal for "enforcement" of all ethical standards that are "fit to be observed?" The answer lies, I think, in the word "enforcement," which, in Dr. Freund's formulation, implies *punitive sanctions* to compel adherence to a moral code. I am not really interested in the punitive aspects of sanctions for misconduct; my concern is with the effect that exposure of judicial misconduct, and its public disapprobation, can have in reinforcing the moral constraints and sensibilities which must bind the community of judges.¹¹³

To say that "not every standard of conduct . . . fit to be observed is also fit to be enforced" is to assume that there exists so great a consensus

112. E. FREUND, STANDARDS OF AMERICAN LEGISLATION 106 (1917).

113. Even a case in which the Courts Commission refuses the imposition of any sanction against the judge may serve a salutary purpose. In *In re Pistilli*, the Judicial Inquiry Board complained that the judge had made statements during a hearing that were "inconsiderate of and discourteous to, and were such as to embarrass and ridicule," a young attorney who appeared before him. The Commission, while holding that the judge's conduct, as an "isolated instance," did not call for disciplinary measures, stated that the "conduct was far from exemplary and is not to be condoned" *In re Pistilli*, No. 76-CC-4 (Ill. Cts. Comm'n 1977).

about the validity and value of the standards of judicial conduct that they need no longer be taught; that deviance is sufficiently rare to be tolerated with a degree of equanimity. I regret to say that I do not find this to be true. Deviance from what ought to be universally accepted norms of judicial conduct is often unblushing and aggressively defended as the "right" of judges to be free of restraints that do not also apply to their fellow citizens. I fear that in Illinois we are still in an "educative" process. Perhaps when that process has borne fruit, the Board may safely be more permissive in the exercise of its prosecutorial discretion.

I have on occasion thought that the measure of discipline imposed in a particular case was inadequate, but I have no criticism of the Courts Commission in that regard. Like the problem of "sentencing" in a criminal case, perceptions about what is appropriate are apt to differ widely. It is uniquely the commission's responsibility,¹¹⁴ and I hope that I have made it clear that my primary concern is with the teaching function of the commission's decisions, not with the particular measure of discipline the commission may see fit to assess. Most of the commission's orders (opinions) are, however, remarkably spare and lean and contain little of preachment or exhortation. It is my hope that the commission will, in time, become less sparing in its opinions, perhaps taking note of the rather comprehensive opinions written by the supreme courts of states such as California in which the supreme court is the ultimate decisionmaker.

The relationship between the Board and the commission has, quite properly, not been a "cozy" one. The Board and the commission have scrupulously refrained from any dialogue, not only about a particular case but even about the philosophy of the judicial disciplinary system. I like to think that a healthy but amiable tension ought to exist between the Board and the commission. "Tension," not in the sense of strain, but in the way in which one speaks, in the context of a musical composition or of a symphony orchestra, of the "tension" between the string section and the basses. The Board and the commission each has its own role to play but with equal dedication to a common purpose. Both have a responsibility for giving a degree of moral leadership in the area of judicial ethics.

CONCLUSION: A WORD OF ADVICE TO PROSPECTIVE APPOINTEES TO BOARDS OR COMMISSIONS IN THE DISCIPLINARY SYSTEM¹¹⁵

In conclusion, I venture to offer a word of advice to all well-intentioned lawyers, non-lawyers or judges who are asked to serve as members of a

114. The Courts Commission has made it clear to the Board that it neither invites nor considers appropriate, recommendations by the Board as to the measure of discipline.

115. Nothing in this section implies anything at all about my colleagues on the Illinois Board.

board or commission in the judicial disciplinary system, and who may have the option of accepting or declining the appointment. A letter to them might run as follows:

If you accept appointment to serve as a member of a board or commission within a judicial disciplinary system, remember, please, that it is an enormously difficult task which is apt to yield you more heartache than satisfaction.

The task you are about to undertake requires a selfless and dispassionate seeking after truth and justice of which not all men and women are equally capable. It is, in fact, one of those tasks that Emerson may have had in mind when he wrote in one of his essays: "God offers to every mind its choice between truth and repose. Take which you please; you can never have both. Between these, as a pendulum, man oscillates. He in whom the love of repose predominates . . . gets rest, commodity, and reputation; but he shuts the door of truth."¹¹⁶

Of the non-lawyers particularly, I would ask you not to assume that all that is required of you is the exercise of your native common sense. There is a vast body of literature on the subject of judicial ethics and norms of judicial behavior in which you ought to be as well read as possible. No one expects you to become a lawyer (quite the contrary—you were appointed because you are not a lawyer) or to master all that has been written on this subject. Nobody has or will. But you have a responsibility to be as "informed" and "educated" as possible.

Justice Roger J. Traynor of the California Supreme Court, writing of non-lawyer representation on a judicial nominating commission, said some interesting things that are, perhaps, even more pointedly applicable to service on a disciplinary board or commission:

I should . . . welcome some representatives of the public. They would not be a Willy or a Miss Minnie who happened to know a governor and little else. The best one can postulate would be citizens of high enough intelligence to comprehend their legal colleagues and of wide enough experience to electrify the legal atmosphere with a few insights from the nonlegal world. They could inaugurate a modern tradition of public service that would do the Republic proud.¹¹⁷

Justice Traynor's reference to Willy and Miss Minnie may require some clarification:

Willy and Miss Minnie are personifications of elements of public opinion. Willy is the nebulous "People's Will" described as "irresponsible" because of his "provincial or partisan notions" and

116. Emerson, *Essay on Intellect*, reprinted in G. SELDES, *THE GREAT QUOTATIONS* at 921.

117. Traynor, *Who Can Best Judge the Judges*, 53 VA. L. REV. 1266, 1278 (1967).

his "emotional bias." His opposition is a "native lady who has collected miniatures for so long that she is known as 'Miss Minnie.'" A very vocal member of the "artistic" community, "in the name of freedom," she intends to "enlist the people on her side" in judgment by popular standard rather than by the law.¹¹⁸

Do not be dismayed by the fact that words like "conduct that brings the judicial office into disrepute" may seem terribly loose; nor terrified that the injunction to avoid not only "impropriety" but the "appearance of impropriety" does not lend itself to easy application. It is the task of the disciplinary agency to help breathe life and meaning into these words. If it could be done by a computer, there would be little need for your service.

The responsibility you have is surely not a light one. But do not let that, in athletic parlance, cause you to "choke" on difficult decisions. And do not expect a neatly packaged precedent on "all fours" with every case you are called upon to decide. The genius of our jurisprudence is that law is made by the slow accretion of precedent, and precedents are made, case-by-case, by those who are not content to contemplate the past but reach into the future. Were it not for generations of lawyers and judges who have sought to vindicate principles for which there was no legal precedent (yes, even in the teeth of existing precedent), our common law would be infinitely poorer than it is. Give some scope to your imagination and conscience; you may "win some and lose some" but the law of judicial discipline will be enriched by it.

To all of you, the non-lawyers, lawyers and judges alike, I offer this counsel: be not overly self-righteous, but neither be so tolerant of human frailty as not to recognize that what may be overlooked in the conduct of ordinary citizens may be a menace in a judge. The halls of justice are not a market place, and the ethical responsibilities of judges are not those of the tradesman. Perhaps it is particularly demanded of the non-lawyer member, who may be a hardheaded businessman, that he understand that the pragmatism he practices in his business is not an acceptable standard in judging the conduct of judges. Willy's ready acceptance of what he may regard as "par" for a cruel and imperfect world is not good enough for the disciplinary system.

Compassion and sympathy are surely great moral virtues. But I beseech Miss Minnie not to comfort herself by dispensing her own brand of tea and sympathy at the expense of the rigorous self-discipline and respect for law which are incumbent upon those who would serve in the disciplinary system.

118. G. Winters, *Preface to AMERICAN JUDICATURE SOCIETY, SELECTED READINGS, JUDICIAL SELECTION AND TENURE* (1973).

While I do not doubt the wisdom of including lawyers in the composition of judicial disciplinary agencies, the position of the lawyer-member, particularly when he is engaged in active practice, is fraught with obvious special difficulties. Lawyers who are uneasy about the possibility of losing popularity with the judges of their community would do well to avoid the task of judging the judges. In any event, they may from time to time reflect, ruefully, on the cynical advice of Ecclesiastes, "be not righteous overmuch, neither make thyself wise; why shouldest thou destroy thyself" ¹¹⁹

As to judge members, it is hardly necessary to say that their role is not as servants of a particular constituency. Their constituency is the people, the judicial institution, and the love we bear to the ideal of equal justice under law. For them too, perhaps for them particularly, the task of judging their peers is not a pleasant one. But if we are to have judicial self-regulation, in part or in whole, the task must be performed with a punctilio of honor that transcends personal considerations.

A POSTSCRIPT—THE *HARROD* CASE

Shortly after this article went to print, the Illinois Supreme Court decided the case of *People ex rel. Harrod v. Illinois Courts Commission* ¹²⁰ which bears importantly on a number of the issues which are discussed in the preceding text. In the *Harrod* case the Courts Commission found that Judge Harrod had repeatedly sentenced defendants, as a condition of probation or conditional discharge, to undergo short haircuts as a punishment for what he regarded as a manifestation of an anti-social attitude. ¹²¹ It held that in so doing the judge had acted so far beyond his statutory or common law authority as to be guilty of a gross abuse of judicial power. It determined that this misconduct violated Illinois Supreme Court Rule 61(c)(18) ¹²² and was cognizable by the Judicial Inquiry Board and the Courts Commission under section 15 of article VI of the 1970 Illinois Constitution. ¹²³ Judge Harrod was suspended from his judicial duties for a period of one month without pay.

The Illinois Supreme Court granted Judge Harrod's petition for leave to file for a writ of mandamus. ¹²⁴ It has now ordered that a writ of mandamus

119. *Ecclesiastes* 7:16.

120. No. 49118 (Ill. November 30, 1977) [hereinafter cited as *Harrod*]. For the earlier proceedings in the *Harrod* case, see the text accompanying notes 76-84 *supra*.

121. Judge Harrod testified that he regarded long hair as "a symbol of defiance for the rights of everybody else" *In re Harrod*, No. 73-CC-3 (Ill. Cts. Comm'n December 3, 1976) at 7.

122. Rule 61(c)(18) provides in pertinent part as follows: "In imposing sentence, a judge should follow the law and should not compel persons brought before him to submit to some act or discipline without authority of law, whether or not he may think it would have a beneficial corrective influence" ILL. REV. STAT. ch. 110A, § 61(c)(18) (1975).

123. ILL. CONST. of 1970, art. VI §§ 15(c), (e). See Appendix A.

124. See notes 81-82 *supra*.

issue against the members of the Courts Commission, directing them to expunge the suspension order from their records.

In the course of its opinion the court acknowledges that the 1970 Constitution mandates that the court is to have no involvement in the judicial disciplinary system's investigative, prosecutorial and adjudicative functions;¹²⁵ that unlike the pre-1970 Courts Commission, the Judicial Inquiry Board is completely independent of the court and its administrative director and staff;¹²⁶ that the present Courts Commission is vested with the sole adjudicative function in the judicial disciplinary system;¹²⁷ that the commission's decisions are final and nonreviewable;¹²⁸ that the supreme court may not concern itself with the "correctness of the Commission's determination";¹²⁹ that the commission clearly had jurisdiction of the subject matter of the complaint against Judge Harrod;¹³⁰ that the fact that a judge's misconduct may be remedied by appeal does not prevent the same conduct from being the subject of a disciplinary action or deprive the Board and the commission of jurisdiction;¹³¹ and that the doctrine of judicial immunity is not automatically applicable merely because an act is committed while a judge is performing in a judicial capacity.¹³²

These principles would seem, at least abstractly, to comport closely with the views on these points which I have expressed in this article. My expectations as to the outcome of *Harrod*, however, have been considerably deflated.

I am not certain that this postscript can in itself do justice to the *Harrod* decision and therefore I ask that this article be read *pari passu* with the court's opinion. It is perhaps as well that my pre-*Harrod* optimism about the independence of the Illinois judicial disciplinary system should remain to be contrasted with what I perceive to be the reassertion by the supreme court of judicial control over the system.

Although it concedes that the 1970 Constitution provides that the decisions of the Courts Commission shall be final and nonreviewable, the court rests its jurisdiction by way of a writ of mandamus against the members of the Courts Commission on a distinction between a review

125. *Harrod*, slip op. at 12.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 8.

130. *Id.* at 16.

131. "Although all misconduct arising during the course of a judicial proceeding may be the subject of an appeal, an individual defendant's vindication of personal rights does not necessarily protect the public from a judge who repeatedly and grossly abuses his judicial power." *Id.* at 15.

132. *Id.*

of the "correctness of the Commission's determination[s]" (which the court acknowledges to be beyond its purview) and a determination of the scope of the commission's constitutional authority. "It is the function and duty of this court to act as the final arbiter of the Constitution" and hence the court "has both the authority and responsibility to determine whether the Commission's acts were beyond its constitutional grant of authority" ¹³³

The proposition that every governmental agency, including the Courts Commission, should be accountable to somebody for an abuse of its constitutional authority to act is attractive to one who, like the author, is committed to the principle that ours is a government of laws and not of men. It is, however, an imperative of the rule of law that judicial review, in the guise of policing constitutional boundaries, should not be the means of constitutional policymaking or "amending" the constitution.¹³⁴ It should also be remembered that there is no fundamental or due process requirement that the decisions of a judicial disciplinary commission should be appealable or subject to review by the courts. Even in criminal cases there is no absolute right of appeal or judicial review independently of constitutional or statutory provisions allowing such appeal.¹³⁵

If the Illinois Supreme Court, in *Harrod*, intends no more than is comprehended by its responsibility to police the constitutional boundaries of the Courts Commission's jurisdiction, its right to do so is, I think, unchallengeable. If, on the other hand, it is really creating a species of judicial review of the commission's decisions, it has itself exceeded its constitutional authority. The consequence is particularly grave because the supreme court's decision in *Harrod* is, of course, not appealable to or reviewable by any other judicial tribunal. It is appropriate to recall Justice Stone's dictum that "the only check upon our own exercise of power is our own sense of self-restraint."¹³⁶

Accepting that it is the supreme court's right to police the constitutional boundaries of the commission's authority, we may ask in what way did the commission so grievously exceed its jurisdiction as to justify the issuance of a writ requiring it to expunge its order? The writ of mandamus was not

133. *Id.* at 6.

134. See R. BERGER, *GOVERNMENT BY JUDICIARY* 249 (1977).

135. "A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law." *McKane v. Durston*, 153 U.S. 684, 687 (1894). See also *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

136. *United States v. Butler*, 297 U.S. 1, 79 (1936) (dissenting opinion). Raoul Berger's question is also apt: "How long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally?" R. BERGER, *GOVERNMENT BY JUDICIARY* 410 (1977).

issued because the commission lacked subject-matter jurisdiction. Nor was it issued for lack of a finding that Judge Harrod had been guilty of repeated violations of a specific rule, rule 61(c)(18) of the supreme court. Rather, the commission's fatal transgression in the eyes of the court is that it undertook to construe and interpret the statute upon which Judge Harrod relied as ostensible authority for his "haircut orders." The point requires some elucidation.

Section 5-6-3 of the Illinois Unified Code of Corrections¹³⁷ provides in part (as set forth in the supreme court's opinion in *Harrod*):

"(a) The conditions of probation and of conditional discharge shall be that the person:

- (1) not violate any criminal statute of any jurisdiction; and
- (2) make a report to and appear in person before such person or agency as directed by the court.

(b) The Court may *in addition to other conditions* require that the person: *** [the section thereafter sets forth 10 other permissible conditions]."¹³⁸

Judge Harrod contended that the haircut orders were one of the unenumerated "other conditions" authorized by the Code. In essence, his submission was that the phrase "in addition to other conditions" gave him lawful authority to impose any conditions he might think proper.¹³⁹

The Board offered two constructions of the statute, one that the word "other" simply referred to the two mandatory conditions set forth in section 5-6-3(a) of the Code, making the ten permissible conditions additional to the two mandatory conditions. Alternatively, the phrase "other conditions" meant conditions additional to the two mandatory and the ten permissive conditions, but of the same type as the ten itemized conditions and directly related to the offenses involved.¹⁴⁰

The commission rejected both the literal interpretation of section 5-6-3(b) for which the respondent contended and the alternative constructions offered by the Board. It adopted instead a "sensible construction" which would require that any "additional conditions" should be directed toward rehabilitation, but reasonably related to the offense, and not be unduly restrictive of personal liberties.¹⁴¹ So evaluated, the haircut orders were held

137. ILL. REV. STAT. ch. 38, § 1005-6-3 (1975) [hereinafter referred to in the text as the Code].

138. Harrod, slip op. at 3.

139. *Id.* In rejecting this contention, the Courts Commission said that it is "certain . . . that the General Assembly did not intend by its reference to 'other conditions' to confer upon each judge unbridled authority to impose whatever conditions he might see fit." *In re Harrod*, No. 76-CC-3 (Ill. Cts. Comm'n December 3, 1976) at 9.

140. Harrod, slip op. at 3-4.

141. *In re Harrod*, No. 76-CC-3 (Ill. Cts. Comm'n December 3, 1976) at 10.

by the commission to be without authority of law and a gross abuse of judicial power.¹⁴²

By the time the commission made its decision in *Harrod* the Illinois Appellate Court for the Fourth District in *People v. Dunn*¹⁴³ had reversed one of Judge Harrod's haircut orders and had construed section 5-6-3(b) as permitting conditions other than those specifically enumerated in the Code but only if there was "some connection between the condition and the crime charged."¹⁴⁴ It held that there was no connection between the length of the defendant's hair and personal appearance and the traffic offense (failure to signal) with which he was charged. The court reversed Judge Harrod's haircut order and remanded the case. It also called attention to Illinois Supreme Court Rule 61(c) (18).¹⁴⁵

The distinction between (1) the construction of the statute in *People v. Dunn* (that "some connection" between the condition and the offense is required); (2) the second of the alternatives offered by the Board (that the condition of probation or conditional discharge be directly related to the offense and of the same type as the ten enumerated permissible conditions); and (3) the commission's own "sensible construction" (that the condition be directed to rehabilitation, reasonably related to the offense and not unduly restrictive of personal liberties) seems to be an exceedingly fine one. They all have in common a requirement that the condition of probation or conditional discharge bear some reasonable relationship to the offense. Under any of these constructions an order that traffic offenders have their hair cut short in the style preferred by Judge Harrod is without authority of law.

Nonetheless, the court holds that in adopting its own "sensible construction" of section 5-6-3(b) of the Code the commission usurped a function committed exclusively to the judiciary. The court said that "[t]he function of the Commission is one of fact finding. Its function in this case was to apply the facts to the *determined* law, not to determine, construe or interpret what the law should be."¹⁴⁶ Because the commission, "in determining whether [Judge Harrod's] orders were without authority of law . . . applied its own independent interpretation and construction of sec-

142. *Id.* at 12. The commission said that the haircut orders obviously bore no relationship to the offenses committed by the defendant. *Id.* at 11.

143. 43 Ill. App. 3d 94, 356 N.E.2d 1137 (1976).

144. *Id.* at 96, 356 N.E.2d at 1138.

145. *Id.*

146. *Harrod*, slip op. at 17. The concept of "determined law" is, I am afraid, somewhat simplistic. Not very much of our "laws" can be said to be so *determined* that they do not require interpretation, construction or the resolution of ambiguities. Even the supreme court's decision in *Harrod* will require some interpretation and construction by the Board and the Courts Commission to determine both its breadth and its limitations.

tion 5-6-3(b) to [Judge Harrod's] conduct," its suspension order is void.¹⁴⁷ That holding is, quite literally, the fulcrum of the supreme court's decision. The constitutional boundaries of the commission's jurisdiction obviously rest upon a very delicate balance.

There is another, and from my point of view an even more regrettable, aspect of the *Harrod* decision. The supreme court holds that "only conduct violative of the Supreme Court Rules of judicial conduct may be the subject of a complaint before the Commission;"¹⁴⁸ that the supreme court is "vested with the exclusive authority to promulgate rules of judicial conduct for judges of this State;"¹⁴⁹ and that the constitutional standards set forth in section 15(c)(1) "were intended to serve only as a guide to the Board in determining whether an alleged violation of rules warranted the filing of a formal complaint."¹⁵⁰

With all respect, this seems to me to set the constitution on its head. If it were intended that a complaint against a judge could be grounded only on a specific rule of the supreme court, it would have been easy to so provide in the constitution. The supreme court reads the majority report of the Judiciary Committee of the Constitutional Convention as saying that "although the standards [appear] general, the canons of judicial ethics, implemented by the courts, give judicial officers adequate notice of the kinds of conduct proscribed."¹⁵¹ It attributes to the committee a recognition of "the need for greater specificity" and says that the committee "deliberately referred judicial officers to the court-adopted rules on judicial conduct."¹⁵²

I suggest that the court has misread the "legislative history." The framers did indeed recognize a need for "specificity" (not "greater specificity") and they supplied this need by spelling out in the constitution the standards of "willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute." These are *the* standards and there is no indication in the majority report of the judiciary committee that the definition of what is judicial misconduct would be referable to "court-adopted rules."

The majority report actually reads as follows:

Of major importance is the requirement that a complaint filed by the Inquiry Board be based upon a determination that a reasonable basis exists that the judge or magistrate has violated *the*

147. *Id.*

148. *Id.* at 14.

149. *Id.* at 11.

150. *Id.* at 13.

151. *Id.*

152. *Id.* at 14.

standards noted, namely wilful misconduct in office, persistent failure to perform his duties, conduct prejudicial to the administration of justice, or other conduct which brings the judicial office into disrepute. If a complaint is based upon physical or mental disability, the reasonable basis must relate to inability to discharge duties. *The specification of standards* is intended to prevent or minimize a 14th Amendment due process challenge that the provisions are void for vagueness, and to eliminate a discretion in the Inquiry Board to file complaints on hasty, ill advised, or inadequate premises. By compelling the Inquiry Board to *focus upon the standards* and the existence of evidence relating to those standards, it is believed that the Board will become neither accusatorial nor inquisitorial in an improper manner. These provisions are especially important for the guidance of the lay members of the Board whose experience in matters of this kind will be more limited than the judicial and lawyer members. Indeed the Committee envisions the informal resolution of many complaints by understandings reached with the judge or magistrate which are adequately remedial and where there will be no cause to proceed to a formal complaint. In these, as in other instances, *the standards* will be both helpful and necessary.

Although *the standards* may appear general, they are in fact grounded in a long professional history of definition and application. The canons of judicial ethics promulgated by the National and State Bar Associations, as implemented by ethical standards established by courts, give adequate notice to judicial officers of the kinds of conduct which are proscribed.¹⁵³

The committee's emphasis is wholly upon the "standards noted," upon the "specification of [these] standards," and upon the requirement that the Board "focus upon [these] standards and the existence of evidence relating to these standards." All of those terms refer to the *constitutional standards*. Nowhere is there a suggestion that a violation of the supreme court's rules should be the exclusive warrant for a complaint of judicial misconduct or that every complaint should somehow be indexed to a specific rule.¹⁵⁴ Such a requirement is both unworkable and an invasion of the independence of the judicial disciplinary system.

153. VI PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 870-71 (1970) (emphasis added).

154. The idea expressed in the last paragraph of the quotation from the majority report (see text accompanying note 153 *supra*) is remarkably similar to the statement of Judge Bartels in *Sarisohn v. Appellate Division*, 265 F. Supp. 455 (E.D.N.Y. 1967), which held that the "for cause" standard of the New York Constitution was not unconstitutional for vagueness:

It would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer. Guidelines may be found in the Canons of Ethics, applicable to both attorneys and judges, adopted by the American Bar Association and other bar associations, and also in the general moral and ethical standards expected of judicial officers by the community.

Id. at 458. For good measure, Judge Bartels quoted *Luke* 12:48: "For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more." *Id.* at 458 n.2.

Judicial misconduct does not lend itself to reduction to a set of formularies in a kind of pharmacopoeia cast in rules of the supreme court.¹⁵⁵ Nor do any implications of due process or equal protection require any greater precision in defining judicial misconduct than is supplied by the constitutional standards. The supreme court in *Harrod* suggests that the constitutional standards, "standing alone, could be subject to a successful constitutional attack."¹⁵⁶ I submit that this is incorrect. If "for cause," standing alone, is not subject to constitutional attack,¹⁵⁷ the constitutional standards are no less adequate to any due process challenge. There is ample precedent that the words "conduct prejudicial to the administration of justice or that brings the judicial office into disrepute" are not subject to challenge as vague or overbroad.¹⁵⁸

My sense of disappointment with the direction the supreme court has taken in *Harrod* is, I suppose, altogether too obvious. I was present at the birth of the Illinois judicial disciplinary system created by the 1970 Constitution. I may even claim some small part in what I perceived as the struggle to free the system, as completely as possible, from control by the judiciary. That was, after all, the point of the debate over "who shall judge the judges"—a debate in which, as the supreme court acknowledges, "the [Judiciary] Committee and convention delegates expressly indicated that this court was to have *no involvement*" in "the judicial disciplinary system's investigative, prosecutorial, and adjudicatory functions"¹⁵⁹

155. "Precisely what 'conduct prejudicial to the proper administration of justice' is or may be, in any or all circumstances, we shall not undertake to say. Indeed, a comprehensive, universally applicable definition may never evolve but it is unlikely we shall ever have much trouble recognizing and identifying such conduct whenever the constituent facts are presented." *In re Diener*, 268 Md. 659, 671, 304 A.2d 587, 594 (1973), *cert. denied sub nom. Broccolino v. Maryland Comm'n on Judicial Disabilities*, 415 U.S. 989 (1974).

Even if it were possible to provide, by rule, an exhaustive compendium of what constitutes judicial misconduct, the supreme court has shown little alacrity for such a task. There has been no significant change in the Standards of Judicial Conduct which pre-date adoption of the 1970 Constitution. Illinois remains one of the few states which have failed to adopt the American Bar Association Code of Judicial Conduct. *See* note 71 *supra*.

156. *Harrod*, slip op. at 14.

157. *See* *Napolitano v. Ward*, 317 F. Supp. 79 (N.D. Ill. 1970) (three-judge panel terminated for lack of constitutional question) and 317 F. Supp. 83 (N.D. Ill. 1970) (preliminary injunction denied), *aff'd* 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972), *rehearing denied*, 410 U.S. 947 (1973). *See* text accompanying notes 55-68 *supra*.

158. The most recent of a long line of cases to this effect is *In re Nowell*, — N.C. —, 237 S.E.2d 246 (1977) in which the court said:

We have previously said without elaboration . . . that the phrases quoted above [willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute] are not unconstitutionally vague or overbroad. We now point out that they are '[no] more nebulous or less objective than the reasonable and prudent man test which has been a part of our negligence law for centuries.'

Id. at —, 237 S.E.2d at 251 (citations omitted). *See also* text accompanying notes 55-68 *supra*; Greenberg, *Judges Are First Class Citizens and a Good Deal More*, 62 Ill. B.J. 378, 379-81 (1974).

159. *Harrod*, slip op. at 12 (emphasis added). *See* text accompanying notes 14-17 *supra*.

If the finality attached to the decisions of the Courts Commission by the 1970 Constitution must yield to the revisory power of the supreme court whenever the commission undertakes to interpret or construe a statute or the common law in the process of determining whether a judge has abused his authority; if no complaint may be made by the Board or entertained by the commission unless the conduct is violative of a rule of the supreme court; if the constitutional standards have no force except as a guide to whether there has been a violation of court-adopted rules, the independence of the disciplinary system may prove to be more apparent than real.

I may perhaps be forgiven if I say that the *Harrod* opinion gives me a certain sense of *deja vu*, or that in the Illinois experience with judicial discipline, as in other facets of the political life of this state, the French proverb may apply: *plus ca change, plus c'est la meme chose*.¹⁶⁰

160. The more it changes, the more it is the same thing.

APPENDIX A

EXCERPT FROM ARTICLE VI OF THE ILLINOIS CONSTITUTION OF 1970

§ 15. Retirement—Discipline

(a) The General Assembly may provide by law for the retirement of Judges and Associate Judges at a prescribed age. Any retired Judge or Associate Judge, with his consent, may be assigned by the Supreme Court to judicial service for which he shall receive the applicable compensation in lieu of retirement benefits. A retired Associate Judge may be assigned only as an Associate Judge.

(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

(c) The Board shall be convened permanently, with authority, to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate

Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas. The General Assembly shall provide by law for the expenses of the Commission.

APPENDIX B

TABLE I

Disposition of Cases by the Illinois Judicial Inquiry Board
1971-1976

	1971	1972	1973	1974	1975	1976	Total
Files Disposed of (Note 1):							
—because information did not survive preliminary screening	10	55	46	58	72	67	308
—after a minimal investigation (evident that no reasonable basis exists for complaint to Courts Commission)	1	25	28	51	52	41	198
—after extensive investigation (determination that no reasonable basis exists for complaint to Courts Commission)	0	5	13	17	27	16	78
—by complaint to Courts Commission	0	1	6	6	4	4	21 (Note 2)
TOTAL	11	86	93	132	155	128	605 (Note 3)

Note 1: The figures for "files disposed of" do not include a great many communications received by the Board which dealt with matters so obviously beyond its jurisdiction or which were so patently frivolous as not to justify "opening a file."

Note 2: Includes as one, two complaints against one judge which were consolidated for hearing by the Courts Commission.

Note 3: As of December 31, 1976, 32 files were pending before the Board.

TABLE II

Disposition of Cases by Illinois Courts Commission
1971-1976

Complaints Filed by Judicial In- quiry Board	Decisions Imposing Discipline (Total 17)				Mooted by Resignation During Pendency of Complaint	Dismissed on Finding for Respondent	Pending as of 12/31/76
	Reprimand	Censure	Suspension Without Pay	Removal			
21*	4	3	7	3	2	1	1
	<div style="display: flex; justify-content: space-around; align-items: center;"> <div style="text-align: center;"> one month 3 </div> <div style="text-align: center;"> two months 1 </div> <div style="text-align: center;"> four months 1 </div> <div style="text-align: center;"> six months 1 </div> <div style="text-align: center;"> one year 1 </div> </div>						

* Includes as one, two complaints filed against the same judge which were consolidated for hearing by the Commission.

